Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NORMAN GABAY,
Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
a/k/a The Foundation for the Oppressed,
an agency or instrumentality of the Islamic Republic of Iran,

and

MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a The Alavi Foundation,
an alter ego of the Mostazafan Foundation of Iran,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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2 October 1998

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QUESTION PRESENTED

Did the courts below misconstrue the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(3), and misapply *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ["*Bancec*"], by extending sovereign immunity for jurisdictional purposes to a violator of international law solely on the ground that the violator did not exercise "day-to-day control" over its agent's commercial activities in the United States?

PARTIES

Petitioner Norman Gabay, a California resident, is a naturalized United States citizen who is considered a "fugitive Jew" by the Islamic Republic of Iran. Petitioner owns and operates a privately held commercial entity doing business in California as The Charles Company. Petitioner brings this action in his individual capacity.

Respondent Mostazafan Foundation of Iran is an entity founded by order of the Ayatollah Khomeini on 1 March 1979. The Mostazafan Foundation of Iran, which was established and now exists under the laws of the Islamic Republic of Iran, is a successor organization to the Pahlavi Foundation of Iran, founded as a nonprofit charitable organization in 1958 by the late Shah of Iran.

Respondent Mostazafan Foundation of New York, n/k/a The Alavi Foundation, is a nonprofit entity incorporated under the laws of New York. It was originally established in New York in 1973 as the Pahlavi Foundation, a branch of the Pahlavi Foundation of Iran, to administer the Shah's charitable activities in the United States. Shortly after Iran's Islamic Revolution in 1979, Respondent's name changed to the Mostazafan Foundation of New York. Respondent's name changed again in 1992 to the Alavi Foundation.

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NORMAN GABAY,

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MOSTAZAFAN FOUNDATION OF NEW YORK,
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an alter ego of the Mostazafan Foundation of Iran,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner Norman Gabay respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on 5 May 1998.

OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit (Graafeiland, Meskill, Cabranes, *per curiam*) is reported at 152 F.3d 918 (table). The text is available at

1998 WL 385909 and is reprinted in the appendix hereto at 1A – 3A.

The Memorandum Opinion of the United States District Court for the Southern District of New York (Sidney H. Stein) is reported at 968 F. Supp. 895, and is reprinted in the appendix hereto at 4A – 13A.

The Memorandum Opinion of the United States District Court for the Southern District of New York (Kimba M. Wood) is reported at 151 F.R.D. 250, and is reprinted in the appendix hereto at 14A – 30A.

JURISDICTION

Invoking federal subject-matter jurisdiction under 28 U.S.C. §1330(a) and 28 U.S.C. §1605(a)(3) as to Respondent Mostazafan Foundation of Iran, and under 28 U.S.C. §1332 as to Respondent Mostazafan Foundation of New York/Alavi Foundation, Petitioner filed suit in the United States District Court for the Southern District of New York on 22 September 1992. On 15 October 1993, the District Court denied Respondents' Motions to Dismiss and ordered limited jurisdictional discovery. *See* 151 F.R.D. 250, *reprinted infra* at 14A. Following the conclusion of discovery, Respondent Mostazafan Foundation of Iran renewed its Motion to Dismiss, or in the alternative, moved for summary judgment. Respondent Mostazafan Foundation of New York/Alavi Foundation moved only for summary judgment. On 4 June 1997, the Southern District of New York granted Respondents' Motions and dismissed the case. *See* 968 F. Supp. 895, *reprinted infra* at 4A.

On Petitioner's *pro se* appeal, considered without benefit of oral argument, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming the District Court's dismissal on 5 May 1998. 152 F.3d 918 (table), *available* at 1998 WL 385909 *and reprinted infra* at 1A. No petition for rehearing was sought.

On 30 July 1998, Justice Ruth Bader Ginsburg ordered that the time for filing this petition for writ of certiorari be extended to and including 2 October 1998.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(l).

STATUTE INVOLVED

28 U.S.C. §1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case –

. . .

(3) In which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for that property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

. . .

STATEMENT OF THE CASE

Petitioner Norman Gabay, a naturalized American citizen who was born in Iran, is regarded by the Iranian courts as a "fugitive Jew."[1] While Iran was ruled by the Pahlavi

[1] "Whereas the stockholders of the above named company are fugitive Jews, and are outside of Islamic Government protection (withdrawing their citizenship), therefore verdict has been issued for the expropriation of their assets." Judgment of the Supreme Court of the Islamic Revolution, File No. 79/62 (23 May 1983), *translation*

Dynasty, Gabay enjoyed significant prosperity in his business affairs, which focused on carpet and textile manufacturing and wholesaling. Gabay's business holdings included factories and real estate; he also owned substantial real and personal property apart from these business holdings. Gabay immigrated to the United States in 1971, settling in California, where he founded The Charles Company to import carpets and export raw materials and machinery. He continued to own and operate his carpet and textile concerns in Iran, and frequently traveled to Iran to meet with the managers of his businesses.

In 1979, Shah Mohammed Reza Pahlavi was swept from power. The new government, led by the Ayatollah Khomeini, embraced Islamic fundamentalism and exhibited a deep hatred for the United States. Because he was an Iranian Jew residing in the United States, Gabay ceased his formerly regular business trips to Iran out of concern for his personal safety. He continued to operate his carpet and textile businesses from the United States through his managers in Iran, and he became a naturalized United States citizen on 25 April 1980.

Respondent Mostazafan Foundation of Iran was created on 1 March 1979 by order of the Ayatollah Khomeini, the Supreme Leader of the Islamic Republic of Iran. Its constitutive document, the "Statutory Bill Regarding the Articles of Association of Bonyad Mostazafan", *translation reprinted infra* at 50A, empowered the Mostazafan

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reprinted infra at 47A. That Court has declared that as "in fact they have left the country and in fact have escaped ... it is obvious that they are outside of Islamic Protection withdrawing their citizenship, and confiscation of their assets in favor of the Islamic Republic of Government is in line with the principles, and thus is being confirmed." *Id.* Norman Gabay and his family have also been described by Islamic Revolutionary Courts to be "runaway Jews for whom Aman (protection) of the Islamic Republic was withdrawn." Judgment of the Supreme Court of the Islamic Revolution, Case No. 79/62 (13 May 1983), *translation reprinted infra* at 48A.

Foundation to take, centralize, and manage the properties of the former Shah and his associates. *Id.* at Art. 2, ¶1, *translation reprinted infra* at 50A. Upon its formation, the Mostazafan Foundation of Iran immediately took control of the Pahlavi Foundation in Iran, which was a non-profit charitable organization established by the Shah. *See* 151 F.R.D. at 251, *reprinted infra* at 16A.

In 1973, the Pahlavi Foundation in Iran had established a branch office in Manhattan, incorporated under the laws of the State of New York as the Pahlavi Foundation. *See* 968 F. Supp. at 896, *reprinted infra* at 5A. At approximately the same time that the Mostazafan Foundation of Iran assumed control of the Pahlavi Foundation in Iran, *see* 151 F.R.D. at 251-52, *reprinted infra* at 16A, the directors of the Pahlavi Foundation in New York met in Tehran and changed the Foundation's name to the Mostazafan Foundation of New York. Minutes of the Special Meeting of the Board of Directors [of the Pahlavi Foundation of New York] held on the 27th day of December, 1979, at Tehran, Iran, *reprinted infra* at 54A. In 1992, the Mostazafan Foundation of New York changed its name to the Alavi Foundation. *See* 151 F.R.D. at 251, *reprinted infra* at 16A.

At some time between the beginning of 1981 and the end of 1983, Respondent Mostazafan Foundation of Iran seized Gabay's carpet and textile businesses, as well as all of Gabay's other real and personal property in Iran. *Id* at 252, 16A. In its May 1983 decision, the Supreme Court of the Islamic Revolution stated that the basis for the uncompensated taking of Gabay's property was his status as a "fugitive Jew." Judgment of the Supreme Court of the Islamic Revolution, File No. 79/62 (23 May 1983), *translation reprinted infra* at 47A.

On 21 December 1981, Gabay filed a pseudonymous action in the United States District Court for the Central District of California seeking compensation for the unlawful and uncompensated taking of his property. *Bernard G.*

Martin, a pseudonym v. *Government of the Islamic Republic of Iran, et al.*, 81 Civ. 6501 (RJK). The purpose of that action was to toll the statute of limitations while Gabay's expropriation claim was pending before the Iran-United States Claims Tribunal, which had been created by the Algiers Accords as part of the comprehensive resolution of the 1979-1981 Iranian hostage crisis. Under President Reagan's Executive Order 12294 (24 Feb. 1981), 31 C.F.R. §535.222, all claims filed in United States courts against the Islamic Republic of Iran, which came within the scope of the Claims Tribunal's jurisdiction, were to be suspended pending consideration by the Tribunal.

Gabay filed his claim with the Iran-United States Claims Tribunal on 19 January 1982, and the following month Gabay's action in the Central District of California was dismissed without prejudice. *Martin* v. *Government of the Islamic Republic of Iran,* 81 Civ. 6501 (RJK) (Minutes Form 11, 22 February 1982), *reprinted infra* at 45A-46A. Before the Claims Tribunal, the Islamic Republic of Iran did not deny having expropriated Gabay's property, but merely challenged the date on which Gabay alleged the taking had occurred. *Gabay* v. *Iran*, Award No. 515-771-2, 27 IRAN-U.S. C.T.R. 40, 41 *reprinted infra* at 37A. Nearly a decade later, on 10 July 1991, the Claims Tribunal dismissed Gabay's claim as beyond its competence for failure of proof that the taking of his property had occurred prior to 19 January 1981, the effective date of the Algiers Accords and the jurisdictional cut-off date for expropriation claims. *Gabay* v. *Iran*, Award No. 515-771-2, 27 IRAN-U.S. C.T.R. 40, 41 *reprinted infra* at 35A. On 12 August 1991, Gabay requested an interpretation of the Tribunal's decision, which was denied on 24 September 1991. *Gabay* v. *Iran*, Decision No. 99-771-2, 27 IRAN-U.S. C.T.R. 194, 195 *reprinted infra* at 31A-33A.

On 22 September 1992, Gabay filed this action in the United States District Court for the Southern District of New

York. Gabay's complaint alleged subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, as amended, 28 U.S.C. §§1330, 1602-1611, as to Respondent Mostazafan Foundation of Iran, and under 28 U.S.C. §1332 as to Respondent Mostazafan/Alavi (New York) Foundation.

Both Respondents filed motions to dismiss on a variety of grounds, which were denied without prejudice by Judge Kimba M. Wood. *Gabay* v. *Mostazafan Foundation of Iran*, 151 F.R.D. 250 (S.D.N.Y. 1993), *reprinted infra* at 14A. In her opinion, Judge Wood focused exclusively on the threshold question of subject-matter jurisdiction under the Foreign Sovereign Immunities Act. Judge Wood found that jurisdiction would be proper under 28 U.S.C. §1605(a)(3), the "expropriation exception," if Gabay could establish that Respondent Mostazafan Foundation of Iran exercised "general control over the day-to-day activities" of its alleged agent, the Mostazafan/Alavi (New York) Foundation. *Id.* at 254, *reprinted infra* at 21A (quoting *Baglab Ltd.* v. *Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987)).[2] Accordingly, the court ordered limited jurisdictional discovery.

Two years later, upon the completion of discovery and following administrative reassignment of the case to Judge Sidney H. Stein, both Respondents renewed their motions to dismiss. On 4 June 1997, Judge Stein granted the motions solely on the basis that he found "insufficient evidence of the day to day control between the foundations to establish subject matter jurisdiction within the purview of the FSIA." *Gabay v. Mostazafan Foundation of Iran*, 968 F. Supp. 895, 899-900 (S.D.N.Y. 1997), *reprinted infra* at 11A.

Following Gabay's *pro se* appeal, considered without the benefit of oral argument, the United States Court of Appeals

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[2] Judge Wood also concluded that Gabay could not establish jurisdiction under 28 U.S.C. §1605(a)(2), the "commercial activities exception" to foreign sovereign immunity. *See* 151 F.R.D. at 255 n.8, *reprinted infra* at 23A-25A n.8.

for the Second Circuit affirmed the decision of the District Court by Summary Order. *See Gabay* v. *Mostazafan Foundation of Iran*, 152 F.3d 918 (2d Cir. 1988) (table), *available* at 1998 WL 385909, *reprinted infra* at 1A.

After retaining counsel, Gabay sought an extension of time in which to file this petition for certiorari. Justice Ruth Bader Ginsburg granted his application on 30 July 1998.

SUMMARY OF THE ARGUMENT

Stated narrowly, the question raised by this petition is whether the courts below erred by declining to exercise subject-matter jurisdiction over the Mostazafan Foundation of Iran pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1605(a)(3). This seemingly narrow question of statutory construction, however, raises large and vital issues of national policy and international relations. Contrary to congressional intent, the courts below have created a safe harbor for international outlaws seeking to preserve their immunity from the jurisdiction of American courts while simultaneously participating in the American marketplace and in the American legal system through their agents in this country.

Congress did not intend such a result, which is also inconsistent with the clear and emphatic guidance of this Court in the closely related context of substantive liability arising from expropriations that violate international law. The Court should grant this petition for certiorari in order to prevent a further evisceration of important national policies adopted by Congress and of fundamental principles of justice recognized by this Court.

REASONS FOR GRANTING THE WRIT

I. By mechanically applying a "day-to-day control" test in deciding whether to attribute the commercial activities of the Mostazafan/Alavi (New York) Foundation to the Mostazafan Foundation of Iran, the courts below rejected this Court's clear teaching in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ["*Bancec*"].

The question presented by this petition concerns the proper interpretation of the Foreign Sovereign Immunities Act ["FSIA"], and the legal test to be used when deciding whether a foreign perpetrator of an illegal expropriation has subjected itself to the jurisdiction of our courts by conducting commercial activities in the United States through an agent in this country.[3] Although this Court's decision in *Bancec* is not technically controlling, it is an appropriate source of general guidance and was so treated by the courts below. Unfortunately, those courts seriously misunderstood the guidance offered by *Bancec*. By adopting and mechanically applying a stringent test that denies jurisdiction except when the foreign expropriator exercises "day-to-day control" over its agent in America, the courts below ignored the flexible principles of equity emphatically endorsed and relied upon by this Court in *Bancec*.

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[3] In order to avoid the possibility of confusion, it is worth emphasizing two important issues that are *not* presented by this petition. First, there is no issue here as to jurisdiction over the Mostazafan/Alavi (New York) foundation, a matter determined by diversity of citizenship rather than by the FSIA. 151 F.R.D. at 257-58, *reprinted infra* at 28A. Second, there is no issue here about the substantive rules allocating liability among the parties to this action. As Judge Wood correctly noted below, *id.* at 255, 23A, that issue has not been addressed because it will arise, if at all, only after the jurisdictional questions have been resolved.

A. Although *Bancec* does not technically control this case, the courts below properly regarded that decision as an appropriate source of guidance.

Bancec is the leading case for issues involving the responsibility of foreign sovereigns for the commercial activities of juridically separate entities. In that case, the Court permitted the American victim of an expropriation by the Cuban government to apply a setoff for the value of the seized property against a debt that the American company owed to a juridically separate commercial entity created by the Cuban government. While noting that duly created instrumentalities of a foreign state are ordinarily entitled to a presumption of independent status, the Court allowed that presumption to be overcome. 462 U.S. at 627-33. This was necessary to prevent the real beneficiary of the claim (the Cuban government) from obtaining relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for its seizure of the American company's property in violation of international law. *Id.* at 631-32.

Technically, *Bancec* resolved only a substantive issue of liability, without construing the FSIA, which is a jurisdictional statute. *See id.* at 619-21. The question presented in this petition for certiorari is one of jurisdiction, and it arises solely under the FSIA. Nevertheless, the courts below looked to *Bancec* for guidance in interpreting that statute, as other courts before them had previously done.[4] We believe this is appropriate, in part because the *Bancec* Court itself noted that it was "guided by the policies articulated by

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[4] *See, e.g., Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 533-34 (5th Cir. 1992); *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990); *Hester International Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 177-78 (5th Cir. 1989); *Baglab Ltd.* v. *Johnson Matthey Brothers*, 665 F. Supp. 289, 294 (S.D.N.Y.1987).

Congress in enacting the FSIA." 462 U.S. at 621. These congressional policies are not dissimilar from the equitable principles, common to international law and federal common law, upon which the *Bancec* Court primarily relied. *Id.* at 623-34.

B. *Bancec* clearly and emphatically rejects adherence to the corporate form where doing so would cause a serious injustice.

Although we agree that *Bancec* is an appropriate source of general guidance for resolving the FSIA issue in the present case, the courts below seriously misconstrued the *Bancec* analysis. The guiding precept of that decision was the broad "equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." 432 U.S. at 629 (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)). This concern for avoiding injustice, and particularly for avoiding the ugly prospect of foreign sovereigns gaining indirect access to the American legal system while simultaneously preserving their immunity from the just claims of American citizens, is exactly why the *Bancec* Court disregarded the corporate form in the case before it. *See* 462 U.S. at 632 (citing *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 713 (1974)).

Bancec took note of several prior decisions, which arose from a variety of factual circumstances and which contained a variety of verbal formulations. What *Bancec* extracted from these decisions was not a simple test or a hard rule, but an equitable principle that aims above all at avoiding injustice. Indeed, the *Bancec* Court specifically cautioned:

> Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.

432 U.S. at 633-34 (footnotes omitted). Ignoring this strongly and clearly worded cautionary statement, the courts below mechanically applied an inflexible "day-to-day control" test that will produce exactly the sort of injustice that *Bancec* properly sought to prevent.

Just as the Cuban government in *Bancec* sought to obtain relief in our courts through a juridically separate entity, while asserting sovereign immunity against the just claim of an American victim of illegal expropriation, so too the Mostazafan Foundation of Iran seeks access to the American legal system through its New York agent while asserting sovereign immunity for itself.

C. The "day-to-day control" test employed by the courts below allows international outlaws like the Mostazafan Foundation of Iran to avail themselves of the American legal system through their agents while preserving their own immunity from jurisdiction in American courts.

The courts below purported to rely on two principles recognized by this Court in *Bancec*: (1) that foreign sovereigns are presumed to be separate from juridically independent entities that they control; and (2) that this

presumption can be overcome.[5] The *Bancec* Court stressed that there could be no "mechanical formula" for deciding when the presumption should be overcome. 462 U.S. at 633-34. The courts below ignored *Bancec*'s central teaching when they ruled that Petitioner can overcome the presumption of independence in this case *only* by demonstrating that Respondent Mostazafan Foundation of Iran "exercised control over *the day-to-day activities* of the New York Foundation." 968 F. Supp. at 899, *reprinted infra* at 11A (emphasis added).

This mechanical formula creates a safe harbor for international outlaws like the Mostazafan Foundation of Iran, enabling them to pursue commercial activities in the United States through entities that they thoroughly control, so long as they refrain from taking the final step of directing the "day-to-day activities" of their agents. Thus, for example, Respondent Mostazafan Foundation of Iran is free to set, and to alter at will, the goals of its (tax exempt) New York agent; to place Iranian government officials on the New York agent's board of directors and to hold meetings of that board in Tehran; and to reap the benefits of (and, indeed, claim credit for) ideologically driven "charitable" activities undertaken by that agent. According to the decisions below, the Mostazafan Foundation of Iran can do all this, and more, without in any way jeopardizing its own immunity from jurisdiction in American courts.

The mechanical rule that produced this result turns *Bancec* on its head. If that rule had been dictated by Congress, it would be shocking and regrettable, but we would have to abide by it. As we show in the next section, however, no such rule has been dictated or even suggested by Congress. Rather, the result below was reached only because

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[5] *See* 152 F.3d 918 (table), *text available* at 1998 WL 385909 *2, *reprinted infra* at 2A; 968 F.2d at 898-99, *reprinted infra* at 8A-11A; 151 F.R.D. at 253-54, *reprinted infra* at 19A-21A.

of the unfortunate phenomenon that this Court noted in *Bancec*:

> The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.

462 U.S. at 623 (quoting *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.)).

This mistake by the courts below threatens to undermine important congressional purposes, as explained in the following section, and should be corrected by this Court before further serious injustice results.

II. The structure and history of the Foreign Sovereign Immunities Act show that the "expropriation exception" to foreign sovereign immunity, 28 U.S.C. §1605(a)(3), requires a different attribution analysis than that underlying the rule commonly employed by courts applying the "commercial activities exception," 28 U.S.C. §1605(a)(2).

The statutory provision that governs this case creates an exception from the usual practice of holding foreign sovereigns immune from suit in American courts. The exception applies, *inter alia*, in any case in which

> [1] rights in property taken in violation of international law are in issue and . . . [2] that property or any property exchanged for that property is owned or operated by an agency or instrumentality of the foreign state and [3] that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. §1605(a)(3).

Two of the three requirements set out in this "expropriation exception" are not seriously disputed in this case. First, Respondents have not disputed that Petitioner's property was taken in violation of international law, and that he is seeking to recover the value of that property. *See* 151 F.R.D. at 252, *reprinted infra* at 18A; *see also Gabay* v. *Iran*, Award No. 551-771-2, 27 U.S.-Iran C.T.R. 40, 42-43, *reprinted infra* at 37A. Second, Respondents have not disputed that the expropriated property (or property exchanged for it) is owned or operated by Respondent Mostazafan Foundation of Iran, which is an agency or instrumentality of the Islamic Republic of Iran. *See* 968 F. Supp. at 897-98 n.2, *reprinted infra* at 7A-8A; *see also Gabay* v. *Iran*, Award No. 551-771-2, 27 U.S.-Iran C.T.R. at 43, *reprinted infra* at 37A; Judgment of the Islamic Revolutionary Court stationed at Bonyad-e-Mostazafan (12 May 1983*) translation reprinted infra* at 49A. Thus, the only question at issue has been whether Respondent Mostazafan Foundation of Iran is "engaged in a commercial activity in the United States."

In addressing this question, the courts below adopted a legal test developed by other courts under the rubric of a *different* statutory provision: the FSIA's "commercial activities exception," 28 U.S.C. §1605(a)(2). This was a serious mistake because the history and purposes of the two exceptions are quite different. Although there is much to be said for the "day-to-day control" test, or something like it, in the context where it was first developed, such a test is completely incongruous when applying the "expropriation exception," 28 U.S.C. §1605(a)(3), at issue in this case. In order to effectuate Congress' purpose in creating this latter exception, and to avoid becoming enslaved by metaphors, courts must refrain from mechanically extending the rigidities of the "day-to-day control" test into areas where they produce serious injustice and create a safe harbor for international outlaws.

A. The nature, history, and purpose of the "expropriation exception," 28 U.S.C. §1605(a)(3), are fundamentally different from those of the "commercial activities exception."

From early on, federal common law generally provided foreign states with absolute immunity from suit. *See, e.g., The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). With the rise of state trading companies in the twentieth century, exceptions began to be made under a theory of "restrictive immunity," which was formally adopted as United States policy by the Department of State in the so-called Tate Letter of May 1952.[6] *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-87 (1983). Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts. *Id.* at 487.

Administration of the restrictive-immunity theory proved problematic. Courts deferred to State Department recommendations on immunity questions, which forced this executive agency to assume a judicial function that often conflicted with its primary mission of conducting American foreign policy: foreign nations frequently pressured the State Department to recommend immunity, and political considerations sometimes led to recommendations of immunity in cases where immunity would not have been available under the restrictive theory. *Id.* The State Department, moreover, did not participate in every case, which left the courts to make their own decisions in that class of cases. As a result, "the governing standards were

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[6] Letter from Jack B. Tate, Acting Legal Advisor, Department of State to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEPARTMENT OF STATE BULLETIN 984-85 (1952) *and in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.)

neither clear nor uniformly applied." *Id.* at 488 (citations omitted).

In 1976, Congress responded to these problems by enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611, which specified seven exceptions to the general rule of immunity for foreign states and assigned the interpretation of those exceptions to the courts.[7] Subsequent amendments added two additional exceptions to the general rule.[8]

The frequently litigated "commercial activities exception," 28 U.S.C. §1605(a)(2), has its origin in the theory of restrictive immunity, with its distinction between sovereign acts and strictly commercial acts. H.R. Rep. No. 94-1487, at 6-7, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06. The fundamental principle, which had been recognized in the Tate Letter, is that when a foreign state enters the American market as a commercial actor, it should to that extent be treated like other commercial entities. Accordingly, the statute deprives a foreign sovereign of immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the

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[7] The originally enacted exceptions to immunity of foreign states from the courts of the United States were waiver, commercial activity, expropriation, gifts in immovable property in the United States, torts occurring within the United States, 28 U.S.C. §1605(a)(1)-(5), suits in admiralty to enforce maritime liens, 28 U.S.C. §1605(b), and counterclaims against foreign state plaintiffs. 28 U.S.C. §1607.

[8] In 1988, Congress added an exception to immunity for actions to enforce arbitration agreements and awards. 28 U.S.C. §1605(a)(6). In 1996, Congress added a new exception to immunity for actions arising from a foreign state's acts of torture, extrajudicial killing, hostage-taking, aircraft sabotage or material support for such an act which results in the injury or death of United States nationals. 28 U.S.C. §1605(a)(7).

> foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2).

In applying this provision to cases in which the commercial activity was carried on by an entity juridically separate from the foreign state, courts have understandably been respectful of the corporate form and correspondingly reluctant to attribute to foreign sovereigns the activities of commercial entities created by those sovereigns. As this Court explained in *Bancec*, it is increasingly common and perfectly legitimate for governments to establish separate governmental corporations designed to pursue a variety of commercial activities. 462 U.S. at 624-27. Unless the principle of limited liability were adhered to, and creditors of government corporations protected from the risk of having their debtors' assets diverted to satisfy unrelated claims against the sovereign, governments would be placed in a worse position than private incorporators. *See id.* at 626-27. As both Congress and the *Bancec* Court recognized, an appropriate respect for the corporate form is also necessary to avoid encouraging other nations "to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." *Id.* at 627-28 (discussing legislative history of the FSIA).

While it is clearly important to avoid treating foreign sovereigns worse than private incorporators, Congress also recognized that foreign sovereigns should not be free to abuse the corporate form. The FSIA's "commercial activities exception" to the general rule of foreign sovereign immunity strikes this balance by subjecting foreign states to U.S. jurisdiction for their own commercial activities, but not for

those of genuinely independent government corporations. In deciding whether a juridically separate entity is in fact the state itself, the lower courts have sometimes applied a test that asks whether the foreign state exercised "day-to-day control" over the activities of the juridically separate entity.[9]

This test, which is broadly consistent with analogous rules in American corporate law, *see, e.g., Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 177-78 (5th Cir. 1989) has an obvious appeal in light of the purpose and history of the "commercial activities exception." In establishing a separate corporation to pursue specific commercial activities, a foreign government is making trade-offs similar to those that an American corporation makes when it establishes an independent subsidiary. There being no obvious reason for applying different rules of attribution in these two highly analogous situations, courts have been inclined to treat them alike.

Whatever justification there is for the "day-to-day control" test under the FSIA's "commercial activities exception," it has no justification whatsoever under the "expropriation exception" at issue here.[10] Unlike the "commercial activities exception," the statutory provision at issue in this case cannot be regarded as a device for facilitating legitimate commercial intercourse by and among the community of nations. Nor is its intent to give foreign states approximately the same access to the advantages of the

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[9] *See, e.g., Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989); *Baglab Ltd.* v. *Johnson Matthey Brothers*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987).

[10] We do not necessarily endorse the "day-to-day control" test for all cases arising under the "commercial activities exception." The proper interpretation of that statutory provision is not raised by this petition for certiorari, and our point here is that the test is clearly *not* appropriate under the "expropriation exception," whatever its merits may be elsewhere.

corporate form enjoyed by private persons. While the commercial activities exception represents the codification of the restrictive doctrine of immunity, the expropriation exception "is not based on the restrictive theory and instead denies immunity for the indisputably 'sovereign' act of expropriation." GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 533 (2d ed. 1992). The purpose of the "expropriation exception," quite unlike that of the "commercial activities exception," is to prevent agencies of foreign states that practice thievery in violation of international law from participating in American commercial life while remaining cloaked with sovereign immunity. In effectuating this purpose, it is wholly inappropriate to treat the foreign agency in question as though it were a legitimate commercial enterprise that should have the same benefits and burdens under American law that are enjoyed by legitimate private businesses. Indeed, the reason for requiring a commercial nexus with the United States in this class of cases is only to provide a justification for asserting jurisdiction over an agency of a foreign sovereign. That justification exists whenever the foreign agency enters our marketplace and avails itself of our legal system, whether or not the agency exercises "day-to-day control" over the entity that it uses to penetrate the United States.

B. In order to effectuate the congressional purpose served by the "expropriation exception," and to prevent abuse of the corporate form, courts must use a more flexible analysis than the "day-to-day control" test allows.

The "day-to-day control" test adopted by the courts below is useful primarily in establishing a fair allocation of responsibilities among entities whose separate juridical status is presumptively the result of legitimate commercial and

governmental purposes. Thus, for example, when the Bank of England (an arm of the British government) seized a failing private bank and replaced its management, while preserving the bank's separate juridical status, American courts were understandably hesitant to attribute the actions of the failing bank to the sovereign without evidence that the government was itself operating the bank on a day-to-day basis. *See Baglab Ltd.* v. *Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289 (S.D.N.Y. 1987). Similarly, when Nigeria created a government corporation to support the development of agricultural projects in that nation, American courts demanded evidence that the government was actually operating the corporation as a precondition to exercising jurisdiction over Nigeria itself in an ordinary breach-of-contract action against the government corporation. *See Hester,* 879 F.2d 170.

Unlike such cases, actions arising under the "expropriation exception" are aimed at foreign government agencies that are accused of violating international law. These are exactly the kind of entities that are most likely to abuse the corporate form and most likely to take illegitimate advantage of any safe harbor that American courts naïvely import from the realm of ordinary business law. The present case is a striking example because it is uncontested that Respondent Mostazafan Foundation of Iran is responsible for property expropriated from "fugitive Jew" Norman Gabay in violation of international law. This Respondent is not an entity like the Bank of England in *Baglab* or like the Nigerian agricultural-development agency in *Hester*, and Gabay's claim in no way resembles the ordinary commercial disputes that gave rise to those cases. If the cases were treated under the same principles, such treatment would simply empower an international outlaw to abuse the American legal system.

Congress recognized this obvious fact when it included the "expropriation exception" as a separate and distinct

element in the FSIA. *See* H.R. REP. NO. 94-1487, 19-20 & n.1, *reprinted in* 1976 U.S.C.C.A.N. at 6618. Similarly, this Court has recognized the propensity of international outlaws to abuse the corporate form:

> [Bancec] contends, however, that the transfer of Bancec's assets from the Ministry of Foreign Trade or Banco Nacional to Empresa and Cuba Zucar effectively insulates it from Citibank's counterclaim. We disagree. Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid international law simply by creating juridical entities whenever the need arises.

462 U.S. at 632-33 (citations omitted). The same open-eyed approach that this Court adopted in *Bancec* should be used here. Rather than create a safe harbor for outlaws, which is the effect of the "day-to-day control" test used by the courts below, American courts should exert jurisdiction under the FSIA's "expropriation exception" when there is evidence that entities like the Mostazafan Foundation of Iran are covertly taking advantage of the American legal system through agents over which they exercise general control and supervision. Jurisdiction over such international outlaws should not be denied merely because they refrain from dictating the day-to-day decisions of their agents in America. Any other result, and in particular the result reached below in this case, would make a mockery of Congress' intent. It would also make a fool of the American legal system. In *Bancec*, this Court refused to allow that to happen in circumstances analogous to those present here. It should do so again.

CONCLUSION

This case raises fundamental questions about the proper balance between two of the central goals of our legal system: promoting legitimate commercial intercourse and preventing outlaws from manipulating rules that are designed to facilitate legitimate transactions. Reconciling the tension between these two goals is a particularly delicate and vital task when it involves adjustments in our domestic law to accommodate the need to give foreign sovereigns the respect they are due.

As is often the case under Article III of our Constitution, these basic issues arise here in the form of questions about subject-matter jurisdiction. Having become dissatisfied with the central role previously played by the Department of State in determining when foreign sovereigns should lose the immunity they ordinarily enjoy from the jurisdiction of our courts, Congress enacted a detailed and comprehensive set of standards in the Foreign Sovereign Immunities Act of 1976. The proper interpretation of that statute, a matter that Congress deliberately assigned to the courts, implicates profound issues of national policy.

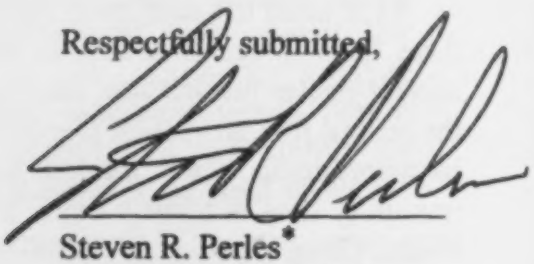
Ignoring the clear and emphatic guidance offered by this Court in the *Bancec* case, the courts below misinterpreted the statute that Congress wrote. By mechanically transporting a test developed for cases ordinarily involving commercial disputes into a very different context, the courts below ignored the distinctions Congress made when it distinguished between ordinary commercial cases and cases involving the rights of people victimized by violations of international law. This misinterpretation of the statute creates a safe harbor for international outlaws who seek to preserve their immunity from jurisdiction while simultaneously participating in American commerce and the American legal system through the agents that they control.

The creation of this safe harbor for international outlaws threatens to undermine extremely important policies reflected

in the Foreign Sovereign Immunities Act. It also threatens to make a mockery of the principles of justice articulated by this Court in *Bancec*. The Court should grant a writ of certiorari in this case to stop this dangerous trend before it does further damage to those policies and principles.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for certiorari.

Respectfully submitted,



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SDNY/nyny
92-cv-6954
S. Grubin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of May, one thousand nine hundred and ninety-eight. [oval seal]

U.S. Court of Appeals
Second Circuit
Filed May 5, 1998
George Lange III, Clerk

PRESENT:

ELLSWORTH VAN GRAAFEILAND,
THOMAS J. MESKILL,
JOSÉ A. CABRANES,
Circuit Judges.

NORMAN GABAY,
Appellant,

v. No. 97-7826

MOSTAZAFAN FOUNDATION OF IRAN a/k/a The Foundation for the Oppressed, an agency or instrumentality of the Government of the Islamic Republic of Iran, and MOSTAZAFAN FOUNDATION OF NEW YORK, an alter ego of the Mostazafan Foundation of Iran,
Appellees.

APPEARING FOR PETITIONER: Norman Gabay, *pro se,* Beverly Hills, CA

APPEARING FOR APPELLEES: John D. Winter, Patterson, Belknap, Webb & Tyler, LLP, New York, NY (Margaret R. Sparks, of counsel), *for Mostazafan Foundation of New York;*
Bruno A. Ristau, Washington, D.C., *for Mostazafan Foundation of Iran.*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge)* and was submitted.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

We affirm the district court's conclusion that it lacks jurisdiction over this Foreign Sovereign Immunities Act ("FSIA") suit because plaintiff Gabay has offered insufficient evidence to overcome the presumption of independence between defendants Mostazafan Foundation of Iran and Mostazafan Foundation of New York. Although Gabay argues that the presumption of independence established by *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba,* 462 U.S. 611 (1983) (*"Bancec"),* applies only to the relationship between a state and its instrumentality, and not to the relationship between two instrumentalities, he has not drawn to our attention any legal authority to support this proposition and has offered no persuasive reason for believing that *Bancec* does not control the instant case. Indeed, for purposes of the FSIA a "foreign state" is defined to include "an agency or instrumentality" thereof, 28 U.S.C. § 1603(a), which would suggest that an agent of such "an agency or instrumentality" would be treated in the same manner as an agent of the state itself. *See also Federal Ins. Co. v. Richard I. Rubin & Co.,* 12 F.3d 1270, 1286-87 (3d

Cir. 1993) (applying *Bancec* to analyze relationship between instrumentality of foreign state and its subsidiaries doing business in the United States); *Foremost-McDesson v. Islamic Republic of Iran,* 905 F.2d 438, 446 (D.C. Cir. 1990) (referring to the FSIA's intent to "separat[e] the liabilities of one state instrumentality from *those of another or* from those of the state") (emphasis added).

We have considered all of Gabay's arguments, and find them to be without merit.

For the Court,
George Lange III, Clerk
by *Lucille Carr* [signature]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Norman GABAY, Plaintiff,
v.
MOSTAZAFAN FOUNDATION OF IRAN, a/k/a the Foundation for the Oppressed, an agency or instrumentality of the Government of the Islamic Republic of Iran, and Mostazafan Foundation of New York, as alter ego of Mostazafan Foundation of Iran, Defendants.

No. 92 Civ. 6954 (SHS).
United States District Court,
S.D. New York.

June 5, 1997.

Arthur W. Rovine,
Baker & McKenzie, New York City, for Plaintiff.

Bruno Alexander Ristau,
Law Offices of Bruno A. Ristau, Washington, DC, for Defendant.

OPINION AND ORDER

STEIN, District Judge.

Defendants move separately to dismiss the complaint in this action, arguing that (1) the court lacks subject matter jurisdiction over plaintiff's claims; (2) the court lacks personal jurisdiction over the Mostazafan Foundation of Iran; (3) plaintiff's claims are time-barred; (4) the complaint fails to state a cause of action on which relief may be granted; and (5) summary judgment should be granted because there is no genuine issue as to any material fact.[1] Because the

[1] The Mostazafan Foundation of Iran moves to dismiss the complaint on the grounds that the court lacks subject matter and personal jurisdiction, that plaintiff's action is time-barred and, in the

Court finds that there is no subject matter jurisdiction over plaintiff's claims, defendants' motions are granted and the action is dismissed.

I. *Factual Background*

Plaintiff Norman Gabay initiated this action on September 22, 1992, to recover damages for the expropriation by the Government of the Islamic Republic of Iran of several business establishments in Iran. (Compl.¶ 1.) Defendants are the Mostazafan Foundation of Iran (the "Iran Foundation") – an entity established and existing under the laws of Iran – and the Mostazafan Foundation of New York, a not-for-profit foundation established in 1973 pursuant to the laws of New York as the Pahlavi Foundation, and currently known as the Alavi Foundation (the "New York Foundation"). (*Id.*; Mirza Aft. ¶ 10.)

Gabay is a native of Iran who, prior to 1979, established a carpet and textile business there. (Compl. ¶¶ 11, 12.) He emigrated to the United States in 1971 and became a naturalized American citizen in 1980. (*Id.* ¶¶ 13, 14.) In the United States, Gabay founded the Charles Company, an enterprise that manufactured plastics, imported Persian rugs, and exported raw material and machinery to one of his Iranian companies. (*Id.* ¶ 13.) Until 1979, Gabay traveled to Iran regularly to supervise the operations of his Iranian businesses. Following the Islamic revolution in 1979, Gabay stopped traveling to Iran, but continued to supervise his businesses there through local managers and from the offices of the Charles Company in this country. (*Id.* ¶¶ 15, 16.)

Gabay claims that sometime during the period of 1981-1983 the Iran Foundation expropriated all his properties in Iran. (*Id.* ¶ 19.) He further claims that the taking violated

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alternative, for summary judgment. The Alavi Foundation moves for summary judgment dismissing the complaint on the grounds that the court lacks subject matter jurisdiction, plaintiff cannot make out a prima facie case against it, and plaintiff's claims are time-barred. Because the defendants' arguments substantially overlap, this Opinion and Order treats them together unless otherwise noted.

international law because (1) he was not compensated, and (2) the property was seized because he is Jewish. (*Id.*)

Gabay contends that this Court has subject matter jurisdiction over this dispute pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11. He claims that the Iran Foundation is an agency or instrumentality of Iran within the meaning of § 1603(a) of the FSIA (Compl.¶ 5); that the Iran Foundation acted as the expropriating agency in Iran (*id.* ¶ 10); that the New York Foundation is a mere "alter ego" of the Iran Foundation (*id.* ¶¶ 6, 23) and engages in "commercial activity" in this district (*id.* ¶¶ 28, 30); and that because of the alter ego relationship, the Iran Foundation itself must be regarded as engaging in commercial activity in New York. (*Id.* ¶ 5.) Thus, Gabay contends that because the Iran Foundation owns the expropriated properties in Iran and engages in business in New York, it is subject to suit for the wrongful taking of his properties in Iran pursuant to the "expropriation" exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(3). (Compl.¶¶ 2, 10.)

II. *Procedural History*

On December 29, 1981, Gabay filed suit against the Government of Iran in the U.S. District Court for the Central District of California, seeking compensation for the expropriation of his property in Iran. (Loomba Decl. ¶ 9.) See Bernard G. Martin. a pseudonym v. Government of Iran, et al., No. 81 Civ. 6501 (C.D.Cal. Dec. 22, 1981). That action was dismissed by the court without prejudice in February 1982, following the issuance by President Reagan of Executive Order No. 12294, 46 Fed.Reg. 14,111 (Feb. 24, 1981), 31 C.F.R. § 535.222 (1997), which implemented the Algiers Accords between Iran and the United States. (Loomba Decl., Exh. 10.) The Accords, which came into force on January 19, 1981, required, inter alia, that all then-existing claims by U.S. nationals against Iran (or its organs or agencies) be asserted before a specialized international tribunal established under the Accords – the Iran-U.S. Claims Tribunal at The Hague, The Netherlands –

and that all suits against Iran in U.S. domestic courts be terminated. The Tribunal was competent to hear, among other controversies, claims by U.S. nationals against Iran and its agencies and organs for the taking of property, if such taking occurred prior to January 19, 1981.

In January 1982, Gabay filed a claim before the Tribunal against Iran for compensation for the taking of his property. (Compl.¶ 7.) The Tribunal ruled- almost a decade later-that Gabay had failed to establish that the claimed expropriation occurred at a time within the Tribunal's jurisdiction. On July 10, 1991, the Tribunal therefore issued a "final award" dismissing Gabay's claim for lack of jurisdiction. (*See* Rovine Aff., Exh. 6.) One month later, Gabay filed an application with the Tribunal requesting an "interpretation" of the award, which the Tribunal denied, writing that it could not "identify any ambiguous language in the Award." (*See id.*, Exh. 7.) This suit followed.

On October 15, 1993, Judge Kimba M. Wood of this court denied motions by the Iran Foundation and the New York Foundation to dismiss the complaint without prejudice to their renewal, and allowed Gabay to engage in limited discovery regarding the relationship between the two foundations. The court held that if Gabay could establish an alter ego relationship between the Alavi Foundation and the Iran Foundation, he would meet the requirements for invoking the FSIA's "international taking" exception to foreign sovereign immunity, § 1605(a)(3).[2] After a long

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[2] Gabay claims jurisdiction pursuant to both 28 U.S.C. § 1602 and 28 U.S.C. § 1332, averring that there is complete diversity among the parties. Jurisdiction pursuant to 28 U.S.C. § 1332, however, can only lie in this Court pursuant to section (2) of that statute, which provides that the courts of the United States shall have original jurisdiction over any civil action between the "citizens of a State and citizens or subjects of a foreign state" (emphasis added). The statute does not allow for jurisdiction against a defendant foreign state or its agency or instrumentality. Gabay therefore appears to argue that the Mostazafan Foundation of Iran is an instrument of the Iranian government for purposes of his claim of jurisdiction pursuant to the FSIA, but that the Iran Foundation is not an instrument of the Iranian government (that is, it is nothing more than a private foundation incorporated in Iran)

period of discovery, marked by numerous disputes among the parties, the defendants have renewed their dispositive motions.

III. *Discussion*

In her October 15, 1993 opinion, Judge Wood presented a lengthy and thorough analysis of the FSIA, which, in her

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for purposes of diversity jurisdiction. In colloquial terms, Gabay thus seeks to have his cake and eat it too. The Mostazafan Foundation of Iran further complicates the jurisdictional issue by averting most strongly that it "is not a part of the Government of Iran ... and ... its employees are not civil servants and are not paid by the government." (Br. of Iran Foundation at 11.)

The Court finds that it does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the Iran Foundation is an agency or instrument of the Iranian government. This conclusion rests on several grounds. First, the complaint alleges that "[t]he Mostazafan Foundation of Iran is an agency or instrumentality of the Government of the Republic of Iran," (Compl.¶ 5), which indicates plaintiff's own belief that the Court's jurisdiction depends upon the FSIA, not the diverse citizenship of the parties. Second, Judge Wood viewed it as "undisputed that the Iranian Foundation is an agency or instrumentality of the Iranian government within the meaning of the FSIA." *Gabay* v. *Mostazafan Foundation of Iran*, 151 F.R.D. 250, 252 (S.D.N.Y.1993). Further, Judge Wood's grant of discovery to the parties was limited to defining the parameters of the relationship between the Mostazafan Foundation of Iran and the Alavi Foundation, a determination necessary only to establish jurisdiction pursuant to the FSIA. Finally, this Court is independently persuaded that the Foundation should be considered an agency or instrumentality of the government of Iran, because "it was created by order of the Ayatollah Khomeini, leader of the revolutionary government of the Islamic Republic of Iran, to centralize, take possession of, and manage property expropriated by the revolutionary government." Id. at 251; *see* Rovine Aft., Exh. 11; *see also Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 441 (D.C.Cir.1990); *Protiva* v. *The Government of the Islamic Republic of Iran*, Case No. 316, Chamber Two, Award No. 566-316-2, at ¶ 70 (July 14, 1995). Accordingly, diversity jurisdiction is improper in this case, leaving plaintiff's only jurisdictional recourse in the FSIA.

words, "sets forth 'the sole basis' for obtaining subject matter jurisdiction over foreign states and their agencies and instrumentalities in the federal courts." *Gabay* v. *Mostazafan Foundation of Iran, et. al*, 151 F.R.D. at 252 (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983)). Judge Wood outlined the purpose of the statute and the exception to foreign sovereign immunity that plaintiff seeks to apply in this case, § 1605(a)(3), which is known as the "expropriation exception." As noted above, she dismissed the defendants' dispositive motions without prejudice and ordered the parties to conduct limited discovery on the issue of "whether the Iranian foundation exercised control over the day-to-day activities of the New York Foundation." *Id.* at 257. The parties having completed that discovery and having renewed their motions to this Court, that question remains the pivotal issue for resolution.

Gabay argues initially that Judge Wood's reliance on *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("*Bancec*"), was misplaced. In *Bancec*, the U.S. Supreme Court held that agencies and instrumentalities of foreign states are entitled to a presumption of independent status from the foreign state, *id.* at 627, 633, 103 S.Ct. at 2600, 2603, but that the presumption may be overcome where "internationally recognized equitable principles" require disregarding the corporate form in order to avoid injustice. The Court suggested two situations in which the presumption of separateness might be overcome: (1) where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," and (2) where recognition of the independent status of the agency or instrumentality would "work fraud or injustice." *Id.* at 629, 103 S.Ct. at 2601.

In interpreting *Bancec*, Judge Wood noted that the "alter ego" question in that case arose in the context of substantive liability, but that "lower courts have applied *Bancec*'s

analysis to issues of FSIA jurisdiction as well." *Gabay* v. *Mostazafan Foundation of Iran, et al.*, 151 F.R.D. at 253 (citing cases). "Under Bancec and its progeny," she wrote, "plaintiff has the burden of overcoming the presumption of independence on the part of defendant foundations." *Id.*

Gabay asserts that the presumption of separateness recognized by the Supreme Court in Bancec applies only to the relationship between a foreign state and an instrumentality or agency of that state. He argues that the presumption was recognized in that particular situation out of consideration for the political and economic importance of the government agency as an instrument for development. (Br. at 16.) This case, he asserts, is different in that the relationship between a state and an instrumentality of that state is not at issue; instead this Court must examine the relationship between an instrumentality of a state – the Iran Foundation – and its alleged agent or alter ego – the New York Foundation.

Even if Judge Wood's analysis were not the law of the case, *See Zdanok* v. *Glidden Co.*, 327 F.2d 944, 953 (2d Cir.1964); *North River Ins. Co.* v. *Philadelphia Reinsurance Corp.*, 63 F.3d 160, 164-65 (2d Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1289, 134 L.Ed.2d 233 (1996); *NLRB* v. *Coca-Cola Bottling Co.*, 55 F.3d 74, 77-78 (2d Cir.1995); *Virgin Atlantic Airways, Ltd.* v. *National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992), this Court would adhere to it. No cause has been shown to abandon Judge Wood's determination that the pivotal issue is whether the Iranian Foundation exercised control over the day-to-day activities of the New York Foundation, nor has plaintiff pointed to any intervening law that undermines that ruling. The key issue in Bancec was whether an American corporation, sued by an instrumentality of Cuba in the United States, could subject that instrumentality to suit through its counterclaim. The Supreme Court rejected state law as governing the issue, remarking on the importance Congress attached to a "'uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *Bancec*, 462 U.S. at 622 n. 11, 103 S.Ct. at 2598 n. 11; *see also*

Barkanic v. *General Admin. of Civil Aviation*, 923 F.2d 957, 959-60 n. 2 (2d Cir.1991). The same considerations apply in this case and require that the jurisdictional determination facing this Court be made utilizing the standards set forth in *Bancec*. *See Gabay* v. *Mostazafan Foundation of Iran, et. al.*, 151 F.R.D. at 254.

The Court now considers whether Gabay has overcome the presumption of independence that rests on the defendant foundations by showing that the Iran Foundation has exercised control over the day-to-day activities of the New York Foundation. Although the parties dispute the time period within which the character of the relationship between the two foundations should be examined for purposes of determining whether the Court has subject matter jurisdiction pursuant to § 1605(a)(3),[3] the Court finds that the Iran Foundation did not exercise day-to-day control over the New York Foundation during either of the relevant periods. Similarly, the Court will not address the admissibility of the evidence Gabay has amassed in his attempt to prove the Iran Foundation's day-to-day control, since even if all of the evidence were admissible, the Court finds that Gabay has not shown such control.

Simply put, the facts developed by Gabay do not show that the Iran Foundation exercised control over the day-to-day activities of the New York Foundation, and thus the Court does not have subject matter jurisdiction over this action. Gabay alleges the following:

> (1) that one of the central purposes of the Iran Foundation, as expressed in its Official Charter, was to control the properties of the Dynasty of the Shah of Iran, which allegedly included the assets of the Pahlavi Foundation of New York. Gabay alleges that the Iran

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[3] Plaintiff claims that this Court must consider the time when his property was expropriated in making its jurisdictional determination, that is, between November 1980 and May 1983. (Br. at 15.) The New York Foundation claims, however, that the proper time frame is the time of the filing of the complaint. (Reply Br. of New York Foundation at 21-22.)

Foundation therefore took over the membership of the New York Foundation's Board of Directors. He asks the Court to draw a negative inference from the change in the Board of Directors in 1979, claiming that by the end of 1979, no director of the Pahlavi Foundation that served prior to the Iranian Revolution remained on the Board. The New York Foundation has shown, however, that there were legitimate reasons for the changes that occurred in the membership of the Board. For example, William Rogers stated, in both a resignation letter and in deposition testimony, that his initial agreement to serve only until the Pahlavi Foundation began to produce income and the Foundation's subsequent achievement of that goal constituted his reason for retiring from the Board. (Loomba Decl., Exh. 6 at 1-2; Winter Reply Aff., Exh. 3 at 13.) Similarly, Dr. Houshang Ahmadi indicated in deposition testimony that he went to his first meeting of the Board at the invitation of Mr. Manoucher Shafie, the president of the New York Foundation at the time, and mentioned nothing to indicate his decision was influenced by a third party. (Winter Reply Aff., Exh. 4 at 17-18.)

(2) that the Iran Foundation was responsible for the change of the New York Foundation's name in 1980 from the "Pahlavi Foundation" to the "Mostazafan Foundation of New York." However, the only evidence in the record regarding the change in name presents legitimate reasons for the change, specifically that the change in name was made at the request of Mr. Shafie, who suggested that as the term meant "helping the needy people," it would fit the purpose of the Foundation. (Winter Reply Aff., Exh. 4 at 42-43.) Mr. Shafie himself testified that he suggested the change because the name "Pahlavi Foundation" had become controversial. (Winter Reply Aff., Exh. 2 at 70-74.)

(3) that certain issues of the newsletter entitled the Bonyad Local Publication demonstrate the Iran

Foundation's takeover and control of the New York Foundation. Those issues do exhibit similarities between the New York Foundation's activities and the activities listed in the newsletters as the Iran Foundation's goals for the New York Foundation. The existence of these similarities, however, does not show a causal connection between the listing of the goals in the newsletters and the actual activities of the New York Foundation.

(4) that documents of the IRS demonstrate a day-to-day control relationship between the foundations. However, the U.S. government has always considered the New York Foundation to be a separate and distinct entity from the Iran Foundation and the documents indicate speculation, at best, that there was a relationship between the Government of Iran (as opposed to the Iran Foundation) and the New York Foundation.

In sum, Gabay has put forth insufficient evidence of day-to-day control between the foundations to establish subject matter jurisdiction within the purview of the FSIA. This Court therefore does not have subject matter jurisdiction over this action.[4]

IV. *Conclusion*

For the foregoing reasons, the motion of the Iran Foundation to dismiss or, in the alternative, for summary judgment, and the motion of the New York Foundation for summary judgment are granted. Accordingly, the complaint in this action is hereby dismissed.

SO ORDERED.

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[4] Gabay also challenges Judge Wood's determination that this Court cannot exercise jurisdiction pursuant to § 1605(a)(2) of the FSIA, which is known as the "commercial activity exception." *See* 151 F.R.D. at 255 n. 8. Judge Wood's analysis of that exception is thorough and well – reasoned, and no further discussion is necessary on the issue.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN ISTRICT OF NEW YORK

Norman GABAY, Plaintiff,
v.
MOSTAZAFAN FOUNDATION OF IRAN a/k/a the Foundation for the Oppressed, an agency or instrumentality of the Government of the Islamic Republic of Iran and Mostazafan Foundation of New York, as alter ego of Mostazafan Foundation of Iran, Defendants.

No. 92 Civ. 6954 (KMW).

United States District Court,
S.D. New York.
Oct. 15, 1993.

Arthur W. Rovine, Baker & McKenzie, New York City, for plaintiff.

John D. Winter, Patterson, Belknap, Webb & Tyler, New York City, Bruno A. Ristau, Ristau & Abbell, Washington, DC, for defendants.

MEMORANDUM OPINION AND ORDER

KIMBA M. WOOD, District Judge.

Plaintiff Gabay sues two defendants – the Mostazafan Foundation of Iran and the Alavi Foundation, also known as the Mostazafan Foundation of New York – to recover compensation for property allegedly expropriated in Iran. Defendants move separately to dismiss the complaint, arguing that (1) the court lacks subject matter jurisdiction over this action; (2) the court lacks personal jurisdiction over the Mostazafan Foundation of Iran; (3) plaintiff's claims are

time-barred; (4) as to the Alavi Foundation, the complaint fails to state a cause of action on which relief may be granted; and (5) the Act of State doctrine bars the court from hearing plaintiff's claim.[1] Because subject matter jurisdiction is a threshold matter for a federal district court in any action against a foreign sovereign or its agency or instrumentality, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-94, 103 S.Ct. 1962, 1971-72, 76 L.Ed.2d 81 (1983), the court considers only subject matter jurisdiction here. For the reasons stated below, the court denies defendants' motions to dismiss without prejudice to their renewal, and directs the parties to conduct limited discovery as to the relationship between the Mostazafan Foundation of Iran and the Alavi Foundation. An evidentiary hearing will be held after the ordered discovery has been conducted if the court deems it necessary.

Background

Plaintiff was born in Iran and owned and operated a substantial carpet and textile business there. In 1971, plaintiff emigrated to the United States, where he founded an American company to import carpets and export raw materials and machinery to plaintiff's business in Iran. He continued to own and operate the Iranian business. Plaintiff became an American citizen in 1981.

Defendant Mostazafan Foundation of Iran ("Iranian Foundation") was created by order of the Ayatollah Khomeini, leader of the revolutionary government of the Islamic Republic of Iran, to centralize, take possession of, and manage property expropriated by the revolutionary

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[1] The Mostazafan Foundation of Iran moves to dismiss on the ground that the court lacks subject matter and personal jurisdiction, that the Act of State doctrine prevents the court from hearing plaintiff's claim, and that plaintiff's action is time-barred. The Alavi Foundation moves to dismiss on the ground that plaintiff has failed to state a claim for which relief may be granted and that the action is time-barred. Because the defendants' arguments exhibit considerable overlap, this opinion and order treats them together except where otherwise stated.

government (Iranian Found. Mem.Ex. 3 at 1-2). The second defendant in this action, the Alavi Foundation ("New York Foundation"), is a non-profit corporation incorporated under the laws of the State of New York. Before a recent amendment to its certificate of incorporation, the Alavi Foundation was known as the Mostazafan Foundation of New York (Pl.'s Reply to Iranian Found. Mem.Ex. F at 2). Plaintiff alleges that the Mostazafan Foundation of New York was created in 1979, when the revolutionary government of Iran took over the Pahlavi Foundation, an entity formerly controlled by the Shah of Iran and other Iranian officials. According to plaintiff, the Mostazafan Foundation of Iran assumed complete control over the Pahlavi Foundation, renamed it the Mostazafan Foundation of New York, and converted it into an arm of its Iranian namesake. Plaintiff alleges that the New York Foundation has been under the control of the Iranian Foundation since that time, and still is under its control, such that the commercial activity of the New York Foundation in the United States can be attributed to the Iranian Foundation. In 1992, the New York Foundation's name was changed to the Alavi Foundation (Rovine Aff.Ex. 29).

It is uncontested that at some time between the beginning of 1981 and the end of 1983, the Iranian Foundation expropriated plaintiff's Iranian carpet and textile business without compensation. A decision of the Supreme Court of the Islamic Revolution approving the expropriation of one of plaintiff's factories stated that the taking was "in line with principles" because plaintiff and his family were "fugitive Jews" living abroad, and thus "outside the Islamic Government protection" (Pl.'s Reply to Iranian Found. Mem.Ex. A). On December 28, 1981, under a pseudonym, plaintiff filed an action against the government of Iran in the U.S. Court for the Central District of California. *Bernard G. Martin, a pseudonym* v. *Government of Iran, et al.*, 81 Civ. 6501 (RJK). This action was dismissed without prejudice in February of 1982, pursuant to Executive Order 12294, which gave exclusive jurisdiction over takings claims of U.S. citizens against the government of Iran to the Iran–United States Claims Tribunal at The Hague, The Netherlands ("the

Tribunal").[2] The Tribunal is an arbitral body established under the 1981 Algiers Accord to hear claims by U.S. Citizens whose property was expropriated by the revolutionary government of Iran before January 19, 1981. The Tribunal has no jurisdiction over takings that occurred after January 19, 1981.

Plaintiff instituted an action before the Tribunal on January 19, 1982. More than ten years later, on July 10, 1991, the Tribunal dismissed plaintiff's claim for lack of jurisdiction because plaintiff was unable to prove that his property was taken before January 19, 1981. Plaintiff's August 12, 1991 request that the Tribunal reconsider its decision was denied. On September 22, 1992, plaintiff instituted this lawsuit.

I. Subject Matter Jurisdiction Over Plaintiff's Expropriation Claim

The Foreign Sovereign Immunities Act (FSIA) sets forth "the sole basis" for obtaining subject matter jurisdiction over foreign states and their agencies and instrumentalities in the federal courts. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983). Under the FSIA, foreign states and their agencies or instrumentalities are immune from jurisdiction in U.S. courts unless one of the statute's explicit exceptions to immunity applies. 28 U.S.C. § 1604, §§ 1605-07. Here, it is undisputed that the Iranian Foundation is an agency or instrumentality of the Iranian government within the meaning of the FSIA. 28 U.S.C. § 1603(b). Therefore, conduct by the Iranian Foundation is immune from suit by plaintiff unless it

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[2] Executive Order No. 12294, February 24, 1981, suspended all takings claims by U.S. citizens against the Iranian government not brought before the Tribunal, except those filed for the purpose of tolling a statute of limitations. The suspension terminates upon a determination by the Tribunal that it lacks jurisdiction over the claim.

falls under one of the statutory exceptions. Plaintiff argues that jurisdiction is proper under the "expropriation" exception, § 1605(a)(3), which provides that a foreign state or its agency or instrumentality is not immune from jurisdiction in the U.S. in cases in which

> rights in property taken in violation of international law are in issue and ... that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States ...

28 U.S.C. § 1605(a)(3).[3]

Defendants do not dispute that plaintiff's property was taken by the Iranian Foundation in violation of international law. Nor do they contest the claim that the Iranian Foundation owns and operates plaintiff's property, or property exchanged for such property. However, the Iranian Foundation argues that the § 1605(a)(3) exception to sovereign immunity is inapplicable because the Iranian Foundation is not engaged in a commercial activity in the United States.[4] Plaintiff contends that the Iranian Foundation

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[3] The full text of § 1605(a)(3) provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ...

> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

[4] The Iranian Foundation also argues that § 1605(a)(3) is inapplicable because the statute requires plaintiff's property, or property exchanged for such property, to be present in the United States (Iranian Found. Mem. at 10-12). This argument rests on a misreading of the statute. Although the first clause of § 1605(a)(3) provides an exception for expropriation of property in violation of international law when "that

is engaged in a commercial activity in the United States through the New York Foundation, its alleged "alter ego." Although defendants do not disagree that the New York Foundation engages in commercial activity in the United States, defendants contend that the two foundations are separate entities, and thus that the activity of the New York Foundation cannot be attributed to the Iranian Foundation for jurisdictional purposes.

A. *Whether the Commercial Activity of One Foreign Instrumentality May Be Attributed to Another For Purposes of FSIA Jurisdiction*

The United States Supreme Court addressed the "alter ego" argument in the context of the FSIA *in First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (*Bancec*), where it considered whether the claim of a foreign agency was subject to set-off for the debts of its parent government. The Bancec Court held that agencies and instrumentalities of foreign governments are entitled to a presumption of independent status that can be overcome only where "internationally recognized equitable principles" require disregarding the corporate form in order to avoid injustice. *Id.* at 627, 633. The Court suggested two situations in which the presumption of separateness might be overcome: (1) where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"

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property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," see supra note 3, the second clause of the expropriation exception contains no such "presence" requirement. *Cf. Antares Aircraft* v. *Federal Republic of Nigeria*, 948 F.2d 90, 97 (2d Cir.1991), *vacated on other grounds*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), *aff'd on reh'g*, 999 F.2d 33 (2d Cir.1992) (where plaintiff does not allege that expropriated property is present in U.S., inquiry shifts to whether property is owned by an agency or instrumentality that engages in commercial activity in the U.S.).

and (2) where recognizing the separateness of the agency or instrumentality "would work fraud or injustice." *Id.* at 629, 103 S.Ct. at 2601. Although in *Bancec*, the "alter ego" question arose in the context of substantive liability, lower courts have applied *Bancec*'s analysis to issues of FSIA jurisdiction as well. *See, e.g., Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 533-34 (5th Cir.), *cert. denied*, 506 U.S. 956, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992); *Foremost-McKesson, Inc.* v. *The Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C.Cir.1990); *Hester International Corp.* v. *The Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir.1989); *Baglab* v. *Johnson Matthey Bankers Ltd.*, 665 F.Supp. 289 (S.D.N.Y.1987). Under *Bancec* and its progeny, then, plaintiff has the burden of overcoming the presumption of independence on the part of defendant foundations. *Arriba*, 962 F.2d at 534; *Foremost-McKesson*, 905 F.2d at 447; *Letelier* v. *Republic of Chile*, 748 F.2d 790, 795 (2d Cir.1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985); *Baglab*, 665 F.Supp. at 296-97.

Plaintiff appears to invoke the first ground set forth in Bancec for overcoming the presumption of independence of the New York Foundation from the Iranian Foundation--the existence of a principal/agent relationship. Plaintiff alleges that the New York Foundation is "so dominated and controlled by" the Iranian Foundation as to render it the latter's "instrumentality or alter ego," and that the New York Foundation "[does] not act independently, but instead act[s] at the direction of ... Mostazafan (Iran)." Complaint at ¶¶ 23, 24.[5] The *Bancec* Court declined to state a "mechanical

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[5] Plaintiff also argues that it would "work a fraud or injustice" to recognize the independent status of the New York Foundation because doing so would permit the Iranian Foundation to "shield its assets ... based on an illusory corporate fiction." Complaint at ¶ 30. As the court observed in *Minpeco, S.A.* v. *Hunt*, 686 F.Supp. 427, 432 (S.D.N.Y.1988), however, this argument begs the question. Recognizing the independence of the New York Foundation would work a fraud or injustice on this argument only if the latter is an illusory corporate fiction, which plaintiff has yet to establish. Hence the Court focuses here on plaintiff's claim that the Iranian Foundation

formula" for determining when the separate status of foreign agencies and instrumentalities should be disregarded, *Bancec*, 462 U.S. at 633, 103 S.Ct. at 2603, but courts applying the principal/agent prong of the *Bancec* test have required the party seeking to overcome the presumption of separateness to show that the alleged principal exercises "general control over the day-to-day activities" of its alleged agent. *Baglab*, 665 F. Supp. at 297. *See also Hester*, 879 F.2d at 178 (core question is whether alleged principal "had assumed day-to-day operation of the instrumentality which it owned"); *Kalamazoo Spice Extraction Co.* v. *Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 660 (D.C.Mich.1985) (attributing foreign instrumentality's contacts with the U.S. to its principal because principal "exercised direct control" over instrumentality). Necessarily, such a showing is highly fact-dependent. In light of the factual dispute underlying the issue of jurisdiction in this case, plaintiff argues that he is entitled to pursue discovery as to the relationship between the two defendants. The defendants counter that if the court lacks subject matter jurisdiction over the claim, they cannot be subjected to discovery, and contend that plaintiff's allegations of a principal/agent relationship are insufficient as a matter of law.

B. *Whether Plaintiff's Alter Ego Claim is Insufficient as a Matter of Law*

Defendants argue that plaintiff has not alleged that the New York Foundation was a party to the expropriation of plaintiff's property, and therefore his "alter ego" claim is legally insufficient (New York Found. Mem. at 13; Iranian Found. Sur-Reply at 7). If defendants were correct, plaintiff would not be entitled to go forward with even limited discovery. *Arriba*, 962 F.2d at 537 n. 17. Defendants' argument is unpersuasive, however; it displays a confusion between the expropriation exception to sovereign immunity

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exercises sufficient control over the New York Foundation to conclude that the two have a principal/agent relationship.

which is at issue here, and the more commonly invoked "commercial activity" exception, 28 U.S.C. § 1605(a)(2).[6] Plaintiffs assert FSIA jurisdiction under § 1605(a)(2) more frequently than under § 1605(a)(3), and thus alter ego claims arise more frequently under that section. Section 1605(a)(2) provides for an exception to sovereign immunity where the action is "based upon " the specified commercial activity by the foreign entity. When a plaintiff grounds the "commercial activity" exception on an alter ego theory, courts have quite naturally required the alleged alter ego to be directly involved in the wrong done to plaintiff; only thus can there be the required nexus between the commercial activity of the entity and the basis of the lawsuit. See, e.g., *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d at 534, & n. 17; *Baglab*, 665 F. Supp. at 294; *Gibbons* v. *Republic of Ireland*, 532 F. Supp. 668, 671 (D.D.C.1982). In the portion of § 1605(a)(3) at issue here, in contrast, there is no such "nexus" requirement. Defendant must be engaged in commercial activity in the United States, but that activity need not have anything to do with the substance of the lawsuit. Therefore no allegation that the New York Foundation participated in the expropriation of plaintiff's property is necessary in this case.

It is true that, where a plaintiff seeks to attribute a wrong committed by one entity to another under an alter ego theory, courts frequently require participation in the wrong by both entities, or an abuse of the corporate form to commit the wrong. *See Hercaire International, Inc.* v. *Argentina*, 821 F.2d 559, 564-65 (11th Cir.1987); *Banco Nacional de Cuba*

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[6] Section 1605(a)(2) provides: A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ...

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

"Foreign state" includes both a foreign government and its agency or instrumentality. 28 U.S.C. § 1603(a).

v. *Chemical Bank New York Trust Co.*, 782 F.2d 377, 380 (2d Cir.1986); *Letelier* v. *Republic of Chile*, 748 F.2d at 794-95. But these cases are relevant only to the extent that the plaintiff seeks to attribute the wrong done him by the Iranian Foundation to the New York Foundation, an issue the court need not deal with at this juncture. The question presently addressed by the court is that of the court's FSIA jurisdiction over plaintiff's claim against the Iranian Foundation. That question involves a different attribution problem: whether the commercial activities of the New York Foundation can be attributed to the Iranian Foundation.[7]

For these reasons, the court cannot conclude that plaintiff's claim is so legally insufficient that he is precluded from discovery as a matter of law. Instead the issue is whether, in light of the deference to foreign sovereigns and their instrumentalities embodied in the FSIA, permitting limited discovery is appropriate.[8]

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[7] For somewhat different reasons, the Iranian Foundation's reliance on *Antares Aircraft* v. *Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir.1991), *vacated*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 *aff'd on reh'g*, 999 F.2d 33 (1993), is inapposite. In that case, plaintiff failed to offer any evidence that the defendant instrumentality engaged in commercial activity in the United States. Plaintiff attempted to overcome this defect by arguing that the commercial activity of the sovereign state could be attributed to the instrumentality on an alter ego theory. The Second Circuit Court of Appeals dismissed because plaintiff's theory asked the Court to attribute the activity of a principal to an agent, rather than that of an agent to a principal. The Court held that this was improper. Here, plaintiff asks that the activity of an alleged agent, the New York Foundation, be attributed to an alleged principal, the Iranian Foundation.

[8] Plaintiff suggests for the first time in his Reply Memorandum that jurisdiction is proper under 28 U.S.C. § 1605(a)(2), the "commercial activity" exception. Although neither plaintiff nor defendants brief this issue, the Court is entitled to address it sua sponte. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 n. 20, 103 S.Ct. 1962, 1971 n. 20, 76 L.Ed.2d 81 (1983). Section 1605(a)(2) provides for an exception to immunity in cases in which, among other things, "the action is based ... upon an act outside the territory of the United

States in connection with a commercial activity of the foreign [instrumentality] elsewhere and that act causes a direct effect in the United States." *See supra* note 6 for full text of § 1605(a)(2).

The court concludes that it cannot assert jurisdiction over this action under § 1605(a)(2), because plaintiff has failed to satisfy that section's "direct effect" requirement. To determine where the "direct effect" of an act takes place, "courts often look to the place where legally significant acts giving rise to the claim occurred." *Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145 (2d Cir.1991), *aff'd*, *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). Here, the "legally significant act" was the expropriation of plaintiff's property in Iran.

Plaintiff alleges that the taking of his property in Iran nevertheless caused losses to his business in the United States by "severing the link" between it and his Iranian business (Plaintiff's Reply Mem. to Iranian Found. at 26). To the extent this allegation means simply that plaintiff suffered a loss of assets in the United States, it is legally insufficient to ground jurisdiction under § 1605(a)(2). "As a general matter, ... '[m]ere financial loss' suffered by a person, whether individual or corporate, in the United States is not, in itself, sufficient to constitute a 'direct effect.' " *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 710 (9th Cir.1992). *See also Antares Aircraft* v. *Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir.1993). Decisions finding that conduct abroad had a "direct effect" in the United States have involved a closer nexus between the conduct and the United States--such as a direct relationship between the foreign defendant and the U.S. plaintiff, or a duty to pay in the United States--than financial loss alone. *See, e.g., Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, ----, 112 S.Ct. 2160, 2168, 119 L.Ed.2d 394 (1992) (rescheduling of maturity dates on Argentinian bonds had "direct effect" in U.S. because New York was "place of performance for Argentina's ultimate contractual obligations"); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir.1985) (finding "direct effect" where foreign instrumentality engaged in "regular course of business conduct with plaintiff," and contrasting cases in which U.S. contacts were "purely fortuitous"). In short, the contact with the U.S. must depend on more than "the fact that the injured person[ ] happened to be American." *Callejo*, 764 F.2d at 1111.

To the extent plaintiff's argument is that the taking in Iran prevented his American company from doing business with his Iranian companies, the court finds this allegation, too, is insufficient. If the "direct effect" requirement were satisfied this easily, a foreign

C. *Whether Limited Discovery Is Appropriate*

The court recognizes that conflicting policies must be weighed in deciding whether to permit preliminary discovery in this case. On the one hand, sovereign immunity provides not merely a defense to liability, but immunity from the burdens of litigation as well. As the Court of Appeals for the Fifth Circuit stated, "[s]everal courts have observed the tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.1992). On the other hand, courts have emphasized that the issue of subject matter jurisdiction under the FSIA should not be resolved without adequate development of the factual record. In *Gilson* v. *Republic of Ireland*, 682 F.2d 1022 (D.C.Cir.1982), for example, the Court of Appeals for the D.C. Circuit remanded the issue of FSIA jurisdiction to the district court for explicit factual findings. Noting that "the district court's ultimate determination of whether jurisdiction is proper may hinge on whether the required agency existed, and for whom," *id.* at 1026 n. 16, the Court of Appeals found that the dismissal of plaintiff's claim was "premature in light of the dearth of fact-finding done by the district court thus far." *Id.* In *Foremost-McKesson, Inc.* v. *The Islamic Republic of Iran*, the same Court of Appeals again remanded a jurisdictional dispute involving an "alter ego" claim to the district court for factual findings. Quoting *Gould* v. *Pechiney Ugine Kuhlmann*, the Court of Appeals stated:

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sovereign who expropriated a company could be sued in federal court for its action by anyone whose business dealings were interrupted by the expropriation, including any former, unrelated customer. The court does not believe that this is what Congress intended. Because the court concludes that plaintiff has not met the "direct effect" requirement, the court need not reach the question of whether the expropriation of his property took place "in connection with a commercial activity" within the meaning of the FSIA.

> "Since entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." Thus, to address a motion to dismiss under Rule 12(b)(1) where the suit involves a foreign sovereign and the court's jurisdiction over the sovereign is contested, the district court must do more than just look to the pleadings to ascertain whether to grant the motion to dismiss.

Foremost-McKesson, 905 F.2d at 449 (quoting *Gould*, 853 F.2d 445, 451 (6th Cir.1988), *cert. dismissed, Pechiney and Trefimetaux* v. *Gould, Inc.*, 503 U.S. 978, 112 S.Ct. 1657, 118 L.Ed.2d 317 (1992). *See also Filus* v. *Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir.1989) (holding, in "alter ego" case, that "generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue").

Here, plaintiff has done more than make conclusory allegations that the New York Foundation is the Iranian Foundation's agent. He has offered an array of documents that, taken together, provide support for the following claims: that the Iranian Foundation claims to have "taken over" the management of the New York Foundation (then the Pahlavi Foundation) in 1979 (Rovine Aff.Ex. 13 at 2); that the Iranian Foundation closely controlled or supervised the New York Foundation (Rovine Aff.Ex. 14 at 20; Ex. 31 at 1); and that the New York Foundation has used its funds in a way that violated its corporate charter, possibly commingling then with those of the Iranian Foundation (Rovine Aff.Ex. 19 at 2). Although these documents by themselves are legally insufficient to overcome the presumption of the New York Foundation's independence, and although many of plaintiff's supporting documents – which include newspaper articles, publications by the Iranian Foundation, and a complaint filed by a former employee of the New York Foundation, later withdrawn – do not constitute evidence admissible at trial, they suggest that admissible evidence might well be obtained if discovery were permitted. Thus they are sufficient to

convince the court that dismissal of plaintiff's claim without discovery on the "alter ego" issue would be premature.

In addition, the equities weigh in favor of permitting discovery in this case because the risk of significant encroachment on a foreign instrumentality's immunity from suit is slight. Under plaintiff's alter ego theory, discovery is likely to be directed primarily toward the New York Foundation, an entity incorporated under the laws of the State of New York over which this court unquestionably has jurisdiction. If defendants are proved correct that the two foundations are separate entities, there will have been no serious threat to the Iranian Foundation's immunity; if plaintiff is proved correct, discovery will have enabled him to seek relief for a serious wrong. The court therefore denies the Iranian Foundation's motion to dismiss without prejudice.

D. *The Scope of Discovery*

Because permitting discovery may tend to undercut the immunity from litigation that foreign instrumentalities were intended to enjoy, the court must ensure that factfinding in this case is limited to "the essentials necessary to determining the preliminary question of jurisdiction." *Gould*, 853 F.2d at 451; *see also Foremost-McKesson*, 905 F.2d at 449; *Arriba*, 962 F.2d at 534. The briefs submitted to the court thus far are an insufficient basis on which to determine the proper scope of preliminary discovery. The court therefore directs plaintiff to submit an appropriately limited discovery plan – including proposed subpoenas, notices of depositions and interrogatories, and requests for document production and admissions – setting forth with specificity the factual allegations he hopes to prove and the method by which he proposes to do so. The plan should be accompanied by a supporting memorandum of law and must be submitted to the court by November 12, 1993. Defendants are directed to submit responsive memoranda and any objections to the proposed discovery requests by November 29, 1993. Because the key question is whether the Iranian foundation exercised control over the day-to-day activities of the New York Foundation, the court expects the parties' briefs to focus

on this issue, and expects proposed discovery to be directed primarily toward the business practices of the New York Foundation. The court will hold a conference with the parties pursuant to Fed.R.Civ.P. 26(f) no later than December 10, 1993, to address discovery issues.

II. Plaintiff's Claim Against the New York Foundation

The position of the New York Foundation in this dispute is somewhat more complex than that of the Iranian Foundation. Under the FSIA, the New York Foundation is excluded from the definition of an "agency or instrumentality" of a foreign sovereign by § 1603(b)(3), because it is incorporated under the laws of the State of New York and has New York as its principal place of business.[9] Technically, therefore, this court cannot assert jurisdiction over the New York Foundation for that foundation's own conduct pursuant to the FSIA. Instead, in a dispute involving only the plaintiff and the New York Foundation, this court would have diversity jurisdiction pursuant to 28 U.S.C. § 1332. Perhaps for this reason, the New York Foundation has not based its motion to dismiss on lack of jurisdiction, but argues that plaintiff has failed to state a claim on which relief may be granted, and that the applicable statute of limitations has run. As the court understands it, the New York Foundation's argument is that plaintiff has failed to state a

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[9] 28 U.S.C. § 1603(b) defines an agency or instrumentality of a foreign state as "any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares of or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country. 28 U.S.C. § 1332(c) provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

cause of action against it because plaintiff has alleged insufficient grounds on which to attribute the Iranian Foundation's conduct to the New York Foundation (New York Found. Mem. at 10-15). This argument goes to the potential liability of the New York Foundation, rather than to the jurisdiction of the court.

The question presently before the court, however, is not the viability of plaintiff's claim against the New York Foundation, but the issue of the court's subject matter jurisdiction over the dispute as a whole. Plaintiff does not sue the New York Foundation for its own conduct; as noted above, he does not allege that the New York foundation owns his property or property exchanged therefore, or that the New York Foundation participated in the expropriation of his property. Rather, plaintiff sues the New York Foundation as the "alter ego" of the Iranian Foundation and as the entity through which the Iranian Foundation engages in "commercial activity" in the United States. Thus subject matter jurisdiction over the expropriation claim is a threshold issue that, if resolved in the negative, disposes of the plaintiff's claims against both defendants. In addition, although the adequacy of plaintiff's claim against the New York Foundation and the court's jurisdiction over plaintiff's claim against the Iranian Foundation are theoretically separate questions, they are practically interwoven, because both depend upon plaintiff's alter ego theory. In light of this interrelationship, and in light of the limited discovery necessary to resolve the jurisdictional issue, it would be premature to grant the New York Foundation's motion to dismiss. The New York Foundation's motion is therefore denied without prejudice.

Conclusion

For the reasons stated above, the court denies defendants' motion to dismiss without prejudice, in order that preliminary discovery may take place as to the court's subject matter jurisdiction over plaintiff's expropriation claim. Plaintiff is ordered to submit a proposed discovery plan and supporting

legal memorandum as set forth on page 17 of this opinion and order by November 12, 1993. Defendants are ordered to submit responsive memoranda and objections as set forth on page 257 of this opinion and order by November 29, 1993. The parties are ordered to appear before the court for a discovery conference at 4:00 p.m. on December 10, 1993.

SO ORDERED.

NORMAN GABAY, also known as Nourollah Armanfar,
Claimant

v.

The Islamic Republic of Iran, *Respondent*

(Case No. 771)

Chamber Two: Ruda, *Chairman;* Aldrich, Ameli, *Members*
Signed 24 *September* 1991[1]
DECISION NO. Dec 99-771-2

The following is the text as issued by the Tribunal:

DECISION

1. On 12 August 1991, the Claimant, Norman Gabay, also known as Nourollah Armanfar, timely filed a letter requesting an "interpretation" of Award No. 515-771-2 (the "Award"), filed on 10 July 1991.[2] In the Award, the Tribunal found that the Claimant had failed to prove that his claims for the expropriation of his properties by the Respondent were outstanding on the date of the Algiers Declarations, 19 January 1981. Accordingly, the Tribunal dismissed the claims for lack of jurisdiction.

2. In his letter, the Claimant states that

> . . . the most important aspect of the Award is the date of expropriation. I feel . . . that several key points regarding the date of expropriation and the evidence relating to those points have been overlooked in reaching the decisions on which the Award [i]s based.

The Claimant goes on to evaluate evidence in the record that, in his opinion, would point to a finding that the taking of his

[1] [Filed 24 September 1991.]
[2] [See p.40 above.]

properties by the Respondent occurred before 19 January 1981.

3. The Claimant concludes by stating that "[t]his letter is not intended as a retrial, and it is solely for purposes of clarification".

4. The Claimant does not identify the relevant Tribunal Rule under which he submits his request. Although the Claimant slates that he is requesting an "interpretation" of the Award, in fact he discusses the evidence on which the Award is based, and concludes that such evidence warrants a finding different from that reached by the Tribunal in the Award; at the same time, the Claimant states that he does not seek a "retrial". The Tribunal is unable precisely to understand what relief the Claimant seeks in his letter. Under such circumstances, the Tribunal will examine the request under the particular Tribunal Rule that might be applicable.

5. According to the Tribunal Rules, after a final Award has been rendered, the Tribunal may only "give an interpretation of the award" (Article 35), correct "any errors in computation, any clerical or typographical errors, or any errors of similar nature" (Article 36), or "make an additional award as to claims presented in the arbitral proceedings but omitted from the award" (Article 37).

6. Nothing in the Claimant's request falls within the scope of Articles 35, 36, or 37 of the Tribunal Rules. Article 35 permits a party to request from the Tribunal an explanation of ambiguous language contained in an Award. *See Lockheed Corporation* v. *Islamic Republic of Iran, et al.*, Decision No. DEC 84-829-2, para. 5 (19 Sept. 1988), *reprinted in* 19 IRAN-U.S. C.T.R. 317, 318; *Paul Donin De Rosiere, et al.*, v. *Islamic Republic of Iran, et at.*, Decision No. DEC 57-498-1, para. 6 (10 Feb. *1987): reprinted in* 14 IRAN-U.S.C.T.R. 100, 102. The Tribunal cannot identify any ambiguous language in the Award, and the Claimant has pointed to none. Accordingly, there is nothing to interpret.

7. Articles 36 and 37 of the Tribunal Rules clearly are not applicable to the request under consideration.

8. Insofar as the Claimant's request constitutes an attempt to reargue certain aspects of the Case, or to request the Tribunal either to review its Award or further to explain its reasons for the Award. There is no basis in the Tribunal Rules or elsewhere for *a* request of this kind on such grounds. *See Paul Donin De Rosiere, supra,* para. 4, 14 IRAN-U.S. C.T.R. 101.

9. For the foregoing reasons,

THE TRIBUNAL DECIDES AS FOLLOWS:

The request filed by the Claimant, Norman Gabay, also known as Nourollah Armanfar, on 12 August 1991 concerning Award No. 515-771-2 is denied.

NORMAN GABAY, also known as Nourollah Armanfar,
Claimant

v.

The Islamic Republic of Iran, *Respondent*

(Case No. 771)

Chamber Two: Ruda, *Chairman;* Aldrich, Ameli,[1]
Members
Signed 10 *July* 1991[2]
AWARD NO. 551-771-2

The following is the text as issued by the Tribunal:

Appearances

For the Claimant: Norman Gabay
Claimant
Burton V. McCullough
Richard B. Lillich
Hamid Sabi
James D. Hepworth
Attorneys

For the Respondents: Ali H. Nobari
Agent of the Government of the
Islamic Republic of Iran
Jafar Niaki
Rahman Noorizadeh
Legal Advisers to the Agent
Abbasse Rahimi
Assistant to the Agent

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[1] [The signature of Mr. Ameli is accompanied by the words "Concurring Opinion". This Opinion is not at present available.

[2] [Filed 24 September 1991.]

Abolfazi Fatemi Shariat Panahi
Attorney
Morteza Moezi
Representative
Dr. Audrey Giles
Expert Witness

Also present: Michael F. Raboin
Deputy Agent of the United States
Lisa Grosh
Attorney-Adviser, U.S. Dep't of State

AWARD

I. INTRODUCTION

1. On 19 January 1982, the Claimant. Norman Gabay, also known as Nourollah Armanfar, filed a Statement of Claim against the Respondent, the Islamic Republic of Iran, seeking compensation in the amount of U.S. $18,147,000, plus interest and costs, for the alleged expropriation of real, business, and personal property.[3] In a subsequent filing, the Claimant increased his request for compensation to U.S. $56,238,380.44, plus interest and costs. The Tribunal joined all jurisdictional issues, including the Claimant's nationality, to the merits. Following the submission of evidence, briefs, and rebuttals by both Parties, a Hearing was held on 1-2 May 1991.

2. The Claimant was born as an Iranian in Kashan, Iran, in 1929. In 1953, he married an Iranian woman. They have three children, all born in Iran between 1955 and 1961, He states that he lived at least the first forty-two years of his life

[3] The Statement of Claim was submitted with the Claimant identified as Bernard G. Martin, a pseudonym. The Tribunal's Registry refused to accept the State of Claim due to non-0compliance with Section 6 of the Administrative Directive No. 1 of 4 July 1981. In March 1982, however, when Claimant acknowledged his true name, the Statement of Claim was accepted by the Tribunal.

in Iran until 1971, when he allegedly emigrated to the United States together with his family. The Claimant also completed his education in Iran.

3. While living in Iran, the Claimant alleges that he founded a sizable carpet and textile business, Arman Establishment ("Arman"), beginning in 1953 with the establishment of Arman Store No. 1. Thereafter, the Claimant and his family members apparently established three other Arman stores, the Kamran Tufting Factory, and finally, the Iran Tatami Company ("Iran Tatami"). Iran Tatami was organized and registered as a limited liability company under Iranian law on 29 July 1976, with the Claimant, his wife, and his three sons all equal shareholders. The Claimant asserts that his business interests other than Iran Tatami constituted a sole proprietorship, although much of the property was held in the names of the members of his immediate family. Likewise, he alleges that he owned a substantial amount of personal real estate, including a house constructed in 1977, although again much of the property was held in the names of his family members.

4. The Claimant alleges that in 1975 or 1976, he and his sons started the Charles Company, a family partnership, under a fictitious business name in California. Initially the company manufactured plastic mats, but that production was abandoned in 1977. Charles Company continued as an importer of Persian rugs and exporter of raw material and machinery for Iran Tatami. In 1977 the Claimant alleges that he bought a house in the United States in the name of one of his sons. The Claimant asserts that by 1979 his principal business had become real estate investing. The Claimant was naturalized as an American citizen on 25 April 1980. At that time he changed his name from Nourollah Armanfar Gabaee to Norman Gabay. It should be noted that in 1973 the Claimant had already changed his family name from Gabaee to Armanfar with the authorization of the Vital Statistics Bureau of Iran.

5. Throughout his time in the United States, the Claimant maintained his Iranian businesses, travelling to Iran "regularly" to supervise their operation. In 1978, however, he

states that, because of political and social conditions in Iran, he ceased travel to Iran, He maintains that he continued to control his business interests there through his Iranian managers, and directly from the offices of Charles Company in the United States. In November 1980, however, the Claimant alleges that all of his and his family's properly interests in Iran were expropriated.

6. The Respondent asserts that the Claimant has always been an Iranian national and accordingly denies the jurisdiction of the Tribunal over his claims, It further asserts that, should the Tribunal find that the Claimant acquired United States nationality in April 1980, the Claimant's dominant and effective nationality at all relevant times remained that of Iran.

7. The Respondent does not deny that the properties in Iran of the Claimant and his immediate family were expropriated, but it asserts that this took place only during the year 1983, following various measures to block and attach such properties during 1982. Therefore, the Respondent argues, the claims in this Case were not outstanding on 19 January 1981 and accordingly are not within the jurisdiction of the tribunal as defined in Article II, paragraph 1, of the Claims Settlement Declaration.

8. In view of its decision, *infra*, with respect to jurisdiction, it is unnecessary for the Tribunal to describe other facts and contentions in this Case.

III. JURISDICTION

9. In order to prove that his claims were outstanding on 19 January 1981, the Claimant relied during the written pleadings primarily upon a reduced photographic copy of a letter dated 1 June 1983 from the Legal Council of the Foundation for the Oppressed ("Foundation") to the Foundation's Investigation and Restoration Unit. This 1 June 1983 letter stated that it enclosed a copy of a judgment of the Islamic Revolution Court dated 6 November 1980 confiscating "all properties of the Claimant, his wife, and

their three children, and a Copy of a confirmation of that judgment dated 23 May 1983 by the High Islamic Revolution Court. The Claimant also submitted in evidence photographic copies of the High Court confirmation (but not the judgment of the Islamic Revolution Court), as well as photographic copies of two letters from the Foundation to Claimant's businesses. One of these letters bore the date 15 November 1980 and introduced two persons as representatives of the Foundation at the "Tatami Company and Arman Stores", The other letter bore the date 18 December 1980 and requested Iran Tatami to furnish "full particulars . . . of all the ex-stock holders of that Company". Finally, the Claimant submitted an affidavit by his cousin who asserted that he had been employed by Arman Stores and had witnessed on or about 15 November 1980 the arrival at one of the Arman stores of individuals who identified themselves as Government representatives and who stated that the Government now controlled Arman.[4]

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[4] On 26 April 1991, only four days before the Hearing, the Claimant requested the introduction of his cousin Rafiolaah Gabai as a rebuttal witness. This request was rejected by the Tribunal's Order of 26 April 1991 "[I]n view of the fact that the Respondent [had] notified no witness aside from its document expert, the lateness with which the Claimant notified Mr. Rafiolaah Gabai as a rebuttal witness for the Hearing, and the lack of any explanation as to why this notification could not have been made earlier.

At the outset of the Hearing on 1 May, the Claimant again requested permission to present his cousin as a rebuttal witness on the ground that inspection at the Tribunal on 29 April of the copies of the 1 June 1983 letter submitted by the Respondents had, for the first time, indicated that this would be desirable. The Claimant also said that, if the tribunal did not grant this request, he would then request a postponement of the Hearing. The Respondent objected to both requests and pointed out that the only witness to be presented by the Respondent was an expert witness on altered documents so that there would be no new evidence for the cousin to rebut. The Tribunal in confirmation with its earlier Order made the following ruling:

> In view of the requirements of the Tribunal Rules that witnesses be notified thirty days in advance – a rule designed to protect both Parties – and in view of the fact that the Claimant alone is responsible for the lateness of his inspection of the evidence in

10. The Respondent denies that any of the alleged actions occurred during 1980 and contends that the reduced photographic copy of the 1 June 1988 letter submitted by the Claimant is forged in that the date of the judgment of the Revolutionary Court, which was originally 15 May 1983, has been altered to 6 November 1980, and that the dates (as well as the numbers) of the other two letters were also altered, in one case from 15 March 1982 to 15 November 1980 and in the other case from 6 April 1982 to 18 December 1980. The Respondent submitted allegedly correct copies of these documents. It also submitted affidavits by the officials of the relevant departments issuing the two other letters as well as copies of the relevant pages of the logbooks in which these letters had been registered, At the Hearing, the Respondent made the logbooks themselves available but the Claimant, arguing that they were presented at a late stage, refused to inspect them.

11. At the Hearing the Respondent presented an expert witness who explained why she concluded that the copy of the letter of 1 June 1983 submitted by the Claimant had been altered and illustrated her views with an overlay that compared that copy with the copy submitted by the Respondent, which was the original carbon copy from which the Claimant's photographic copy had been made. In response, the Claimant asserted that the copy he had submitted was unchanged from the copy he had received from unnamed friends in Iran but acknowledged that the date in question appeared to have been altered. The Claimant's expert witness, already introduced to rebut the Respondent's expert testimony, which the Tribunal allowed by its Order of 12 April 1991, did not appear before the Tribunal. The Claimant maintained, however, that the other two letters upon which he relied were genuine and that it was the Respondent's copies that had been altered. The Claimant did

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question, the Tribunal is unable to grant his request to present Rafiolaah Gabai as a rebuttal witness.

The Tribunal is also unwilling to postpone the Hearing, as this would be unfair to the Respondent and would be inconsistent with the orderly procedures required of the Tribunal.

not say whether he received those two letters from the same unnamed friends who sent him the copy of the 1 June 1983 letter. While the Respondent's expert witness acknowledged during the final rebuttal presentation that she had also seen those two letters, she had not been asked to comment upon them in her original testimony and, due to the Claimant's objection, she was not permitted to comment upon them in the rebuttal presentation.

12. The Respondent explained that upon examination of the documents, its expert witness had advised that comparison of the two documents with the copies submitted by the Claimant was impossible. The Respondent added that the reason for the impossibility was due to the fact that the original handwritten numbers and dates of the two typewritten letters had altogether been deleted and replaced by new ones rather than having been altered. Consequently, in support of its contention. The Respondent relied on the relevant pages of the logbooks, where the original numbers and dates of the two letters had been registered as well as on the affidavits of the respective authorities and other evidence.

13. On the basis of the testimony of the Respondent's expert witness and of the Claimant's statements at the Hearing as well as other evidence, the Tribunal is convinced that the copy of the letter of 1 July 1983 submitted by the Claimant has been altered. Therefore, the Tribunal does not consider this document in determining the date on which the claim arose. The Tribunal notes that the Respondent had taken issue with the authenticity of the Claimant's copy of the said letter in its Statement of Defense of 6 December 1988. On 13 July 1989, the Respondent offered to submit, among other documents, the original carbon copy from which the Claimant's photographic copy of that letter was made, and it did so on 16 October 1989, more than eighteen months before the Hearing. Even before the Respondent's document had been submitted, the Claimant asserted that "the production of the original false document will prove nothing", and the Claimant and his expert failed to examine the original until two days before the Hearing. The Claimant changed his position only at the Hearing, when his attorney

conceded that the Claimant's document appeared to have been altered while the Respondent's copy appeared not to have been altered. The Tribunal disapproves of such behavior on the part of the Claimant and his attorney. Although it does not have the power to impose sanctions or disciplinary measures for presentation of false evidence, the Tribunal cannot pass over such abusive conduct in silence. The Claimant should have investigated the authenticity of his document before its presentation to the Tribunal and, at any rate, should have compared it to the original copy presented by the Respondent, and withdrawn his document and accusations of forgery against the Government of Iran soon after the latter's comments and evidence were filed.

14. In deciding when the Claim arose, the Tribunal must weigh all the remaining relevant evidence. In addition to evidence previously noted, that includes the following:

A. A memorandum dated 19 April 1981 from the Foundation to the representative of the Public Prosecutor's Office at the Foundation reporting an investigation of several companies ordered on 11 March 1981, including the "Arman Company" (meaning, in all likelihood, Iran Tatami). The memorandum identified the Claimant and his family as the owners of the company and stated that they were residing abroad and that the company was being managed by Mr. Alireza Shahani. The Claimant acknowledges that Mr. Shahani was his appointee as Managing Director.

B. A memorandum dated 9 July 1981 from the representative of the Public Prosecutor's Office at the Foundation to the headquarters of the Islamic Revolutionary Public Prosecutor forwarding for action the report of 19 April 1981.

C. Minutes of the General Meeting of Iran Tatami dated 14 July 1981 which were signed by the Claimant. The Claimant acknowledges signing the Minutes which he says were sent to him in the United States and also acknowledges sending spare parts to his Iranian companies until 1982. He asserts that he did so in the

hopes that the companies would be returned to him.

D. Letters from the Islamic Revolutionary Public Prosecutor dated 30 December 1981 and 27 January 1982 declaring that the Claimant and his immediate family members were enjoined from making any real estate transactions, ordering the blocking of their bank accounts, and issuing a writ of attachment of their moveable and immoveable property.

E. An affidavit by Mr. Shahani in which he states that he was in charge of managing Iran Tatami until 14 May 1981 and handed over control to representatives of the Foundation on 15 March 1982.

F. Minutes of a meeting dated I 5 March 1982 in which Mr. Shahani delivered to the representatives of the Foundation the inventory of the Arman stores and Iran Tatami.

G. A letter dated 29 March 19H2 from the Foundation to the Corporate and Industrial Ownership Registration Department announcing the names of a new Board of Directors of Iran Tatami, and its 10 April 1982 announcement of the same, published in the Official Gazette of 13 May 1982.

H. Financial reports of Iran Tatami and the Arman Establishment, prepared after their expropriation but submitted by the Claimant, which describe the companies' transfer to the Foundation as being by virtue of the Public Prosecutor's writ of attachment of 27 January 1982.

I. An excerpt from an article chat appeared in a Foundation periodical in 1984 or 1985 reporting that Iran Tatami was attached in the Persian year 1360 (extending from 21 March 1981 to 20 March 1982) and that all of its shares were expropriated in the year 1362 (21 March 1983 to 20 March 1984). This evidence was proferred by the Claimant.

15. With respect to the dates of the other two disputes

letters, *supra*, paras. 9-10, the Tribunal finds that the evidence presented by the Respondent, particularly the affidavits by responsible officials, the relevant pages from the logbooks, and the sequence of events indicated by other evidence, casts such doubt on the dates written on the copies of the letters submitted by the Claimant as to require the Claimant to present evidence of their validity. This the Claimant has not done; in fact, he has submitted virtually no evidence on this question.

16. With respect to Iran Tatami, the Claimant's signing the Minutes of the General Meeting of the company's shareholders dated 14 July 1981 is particularly inconsistent with a finding that this company was expropriated in November 1980. The tribunal fails to understand the reason why, in the first place, the Minutes were sent to him in the United States if Iran Tatami had already been expropriated. The Claimant's explanations in his pleadings and at the Hearing were unpersuasive as to why he signed the minutes. He did not even address the question why the minutes were sent to him.

17. On the basis of the evidence as a whole, the Tribunal concludes that the Claimant has failed to prove that his Claims for the expropriation of his properties by the Respondent were outstanding on the date of the Algiers Declarations, 19 January 1981. Even if the Claimant were able to prove his asserted 1980 dates for the two disputed letters, which he certainly has not done, the evidence, including Claimant's own behavior, would not support a finding that the companies, let alone the real properties, were controlled or taken by the Respondent before 1982. Consequently, the Claims must be dismissed by this Tribunal for lack of jurisdiction. In view of this holding, the Tribunal need not address other jurisdictional questions in this Case or whether any particular property belonged to the Claimant.

18. Each of the Parties shall bear its own costs of arbitration.

IV. AWARD

19. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

A. The Claims of the Claimant, Norman Gabay, also known as Nourollah Armanfar, are dismissed for lack of jurisdiction.

B. Each of the Parties shall bear its own costs of arbitration.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. 81-6501 RJK Date February 22, 1982
Title Martin v. Government of Iran

DOCKET ENTRY

ENTERED
FEB 24 1982
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

PRESENT:
HON. ROBERT JL KELLEHER, JUDGE
James Kimball n/a
Deputy Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
n/a

ATTORNEYS PRESENT FOR DEFENDANTS:
n/a

PROCEEDINGS:

Plaintiff, an American, citizen, having filed the above entitled action against the Islamic Republic of Iran and various alter egos thereof,

It appearing that plaintiff's claim is subject to the jurisdiction of the Iran United States Claims tribunal and is suspended, insofar as this court could take action, pursuant to Executive order 12294,

The Court having issued, on February 8, 1982, an order to show cause why this action should not be dismissed without prejudice subject to the right of any party to move to reopen the action at any time prior to the entry and satisfaction of a judgment of the Arbitral Tribunal, such

motion to be made on the grounds that the settlement has failed of its essential purpose,

Plaintiff having filed a notice of nonopposition to such dismissal on February 19, 1982,

It is hereby ORDERED, ADJUDGED, AND DECREED tat plaintiff's action is dismissed without prejudice subject to the right of any party to move to reopen the action at any time prior to the entry and satisfaction of a judgment of the Arbitral Tribunal, such motion to be on the grounds that the settlement has failed of its essential purpose.

CC; Lillick McHose & Charles
Anne Bullinger
Valerie Baker
707 707 Wilshire Blvd.
Los Angeles, CA 90017

[translated from Farci]

Dated 62-3-2 (23 May 1983)

In the Name of the Almighty
Emblem
The Islamic Republic of Iran
The Supreme Court of the Islamic Revolution

With a view to File No. 79/62 of the Central Islamic Revolutionary Court, located at the Bonyade Monstazafan (Foundation for the Destitutes), concerning stockholders of the Tatami Company, which was judged upon at the Islamic Revolutionary Tribunal, located at Bonyade Mostazafan. Whereas the stockholders of the above named company are fugitive Jews, and are outside of Islamic Government protection (withdrawing their citizenship), therefore verdict has been issued for the expropriation of their assets. The matter was brought forward at the Islamic Supreme Revolutionary tribunal, and the result is hereby announced as follows:

By virtue of the official document (page 21), the stockholders of the above-named Company are:

Nourollah Armanfar, son of Morad, his wife Mahboubeh Chadorchi, daughter of Rahmin, and his three sons, named Kamran, Mehran and Arman, and in accordance with the witnesses given by the above-named Company's previous employees, indicated in pages 26 to 37, they are Jews and are living abroad, who after the revolution, due to incompatibility with the Islamic government, have left the country; in fact they have left the country and in fact have escaped. Therefore, it is obvious that they are outside of Islamic Protection withdrawing their citizenship, and confiscation of their assets in favor of the Islamic republic of Government is in line with the principles, and thus is being confirmed.

The Islamic Supreme Court
(seal and Signature)

[translated from Farci]

Supreme Islamic Revolutionary Court
Islamic Republic of Iran
Date: 23.2.62 (13.5.1983)
No:
Case No.79/62 before the Islamic Revolutionary Prosecutor's Office, Tehran stationed at Bonyad-e-Mostazafan, related to the shareholders of Iran Tatami Co. which when was decided by the Isalmic [sic] Revolutionary Court stationed at Bonyad-e-Mostazafan whereby an order of expropriation was given on the ground that the shareholders of the said company were the runaway Jews for whom Aman (protection) of the Islamic Republic was withdrawn, is decided by the Supreme Islamic Revolutionary Court and the judgment is declared as follows:

According to the notarial document (p.21) the shareholders of said company include Nourollah Armanfar [Norman Gabay], son of Rad, and his wife Mahboubeh Chadorchi, daughter of Rahim, and thus their three sons named Kamran, Mehran and Arman, and according to the testimony of senior employees of said company, pp.26 through 37, said individuals are Jews who reside abroad and who left Iran as a result of their failure to reconcile with the Islamic Republic; indeed they are fugitives.

Accordingly it is established that they deserted the Aman (protection) of the Islamic Republic of Iran. The order of confiscation of their property in accordance with the provisions of law is confirmed.

Supreme Islamic Revolutionary Court
(sgd) 23.2.62 (13.5.1983)

IN THE NAME OF GOD

With due consideration to the confirmation of the Supreme Islamic Revolutionary Court and the writing of the judgment of expropriation of property of said individuals, the said judgment is final and binding.
(sgd. & sealed) rectangular seal: No. 251/363
Date 5.3.62 (26.5.1983)

[translated from Farci]

The Islamic Republic of Iran
Islamic Revolutionary Prosecutor's Office, Tehran
No: 251-323
Date: 25.2.1362 (15.5.1983)
Page:

IN THE NAME OF GOD

The Islamic Revolutionary Court stationed at Bonyad-e-Mostazafan was held on 22.2.62 (12.5.1983) to decide the case of the shareholders of Iran Tatami Co. which has been expropriated and is being managed under the supervision of Bonyad-e-Mostaazafan. After reviewing the documents and evidence on record, the following judgment was made:

Judgment of the Court

In view of the evidence on record, including the investigations made by the prosecutor's Office and the statements of witnesses, it is established that the persons named below (the shareholders of Iran Tatami Co.) are no longer under the Zemmeh (charge) of the Islamic republic of Iran. It is ordered that their property be taken in favor of the oppressed.

1. Nourollah Armanfar, son of Rad, the holder of identity card No.53 issued from Kashan. [Norman Gabay]

2. Mahboubeh Chadorchi, daughter of Rahim, the holder of identity card No.391 issued from Tehran.

3. Kamran Armanfar, son of Nourollah, the holder of identity card No.___ issued from Tehran.

4. Mehran Armanfar, son of Nourollah, the holder of identity card No.30196 issued from Tehran.

5. Arman Armanfar, son of Nourollah, the holder of identity card No.l630 issued from Tehran.

Religious Judge, Islamic Revolutionary
Court stationed at the Bonyad-e-Monstazafan
Date: 22.2.1362 (12.5.1983)

[translation from Farci]

COMPILATION OF LAWS
YEAR 1359 [1980] PAGES 258 TO 266

PUBLISHED BY : OFFICIAL GAZETTE OF THE ISLAMIC REPUBLIC OF IRAN

OFFICIAL GAZETTE NO. 10326 DATED 1358/5/18 [AUG. 9, 79]

NO. 6356 1359/4/25 [JULY 16, 80]

BONYAD MOSTAZAFAN (FOUNDATION FOR THE OPPRESSED)

THE STATUTORY BILL REGARDING THE ARTICLES OF ASSOCIATION OF BONYAD MOSTAZAFAN (FOUNDATION FOR THE OPPRESSED) APPROVED BY THE REVOLUTIONARY COUNCIL OF THE ISLAMIC REPUBLIC OF IRAN IN THE SESSION DATED 1359/4/21 [JULY 12, 1980]

THE STATUTORY BILL REGARDING THE ARTICLES OF ASSOCIATION OF BONYAD MOSTAZAFAN

IN ORDER TO CENTRALIZE THE PROPERTIES OF THE PAHLAVI DYNASTY AND THOSE OF WHOM THROUGH CONNECTION WITH THIS DYNASTY ACCUMULATED ILLEGITIMATE WEALTH - FOR WHICH THE REVOLUTIONARY COURT ISSUES AND WILL ISSUE JUDGMENTS WITH RESPECT TO THE RECLAMATION THEREOF FOR THE PURPOSE OF OWNERSHIP BY THE OPPRESSED PEOPLE - AND IN ORDER TO PROVIDE THE REVENUE, GENERATED FROM THESE PROPERTIES, FOR THE BETTERMENT OF THE LIVING CONDITIONS OF THE OPPRESSED PEOPLE, IN PARTICULAR THEIR HOUSING CONDITIONS, IN ACCORDANCE WITH THE ORDER

ISSUED BY AYATOLLAH IMAM KHOMEINI APPROVED BY THE REVOLUTIONARY COUNCIL, AN INSTITUTION WITH THE NAME OF "BONYAD MOSTAZAFAN" [FOUNDATION FOR THE OPPRESSED] IS ESTABLISHED ACCORDANCE WITH THE PROVISIONS OF WHICH THESE WILL BE MANAGED IN ARTICLES OF ASSOCIATION AND RELATED REGULATIONS.

ARTICLE ONE: THE NAME OF THE INSTITUTION

THE NAME OF THE INSTITUTION IS "BONYAD MOSTAZAFAN" [FOUNDATION FOR THE OPPRESSED] IS HEREINAFTER REFERRED TO AS THE "BONYAD" [FOUNDATION].

ARTICLE TWO: SUBJECT MATTER AND THE PURPOSE OF THE INSTITUTION

1. TO CENTRALIZE IN THE FOUNDATION ALL THE CASH, SHARES OF STOCK, NEGOTIABLE – INSTRUMENTS, MOVABLE AND IMMOVABLE PROPERTIES OF THE PAHLAVI DYNASTY AND THE PROPERTIES OF THOSE NATURAL AND LEGAL PERSONS WHO THROUGH CONNECTION WITH THE DYNASTY ACCUMULATED ILLEGITIMATE WEALTH - FOR WHICH THE REVOLUTIONARY COURT ISSUES AND WILL ISSUE JUDGMENTS FOR THEIR RECLAMATION OR TEMPORARY MANAGEMENT - AND TO PUT THE PROPERTIES IN THE POSSESSION OF THE FOUNDATION, ON BEHALF OF THE OPPRESSED PEOPLE, AND TO MANAGE AN [sic] UTILIZE THESE PROPERTIES WHETHER WITHIN OR WITHOUT THE COUNTRY .

2. TO ACCEPT CASH AND MOVABLE AND IMMOVABLE PROPERTIES WHICH ARE GIVEN AS GRANTS BY NATURAL AND LEGAL PERSONS

AND TO MANAGE AND UTILIZE THESE PROPERTIES.

3. TO UTILIZE ALL THE REVENUES OF THE FOUNDATION FOR THE BETTERMENT OF THE LIVING CONDITIONS OF THE OPPRESSED, IN PARTICULAR THEIR HOUSING CONDITIONS, WITH DUE REGARD TO THE PRIORITIES TO BE DETERMINED IN THE RELATED REGULATIONS.

* * *

ARTICLE THREE: THE NATURE AND THE NATIONALITY OF THE FOUNDATION

THE FOUNDATION IS A NOT-FOR-PROFIT INSTITUTION
NATIONALITY OF WHICH IS IRANIAN.

* * *

ARTICLE SIX: THE INCORPORATORS

THE ESTABLISHMENT OF THE FOUNDATION IS BASED ON THE ORDER OF AYATOLLAH IMAM KHOMEINI AND THE APPROVAL OF THE REVOLUTIONARY COUNCIL, AND THE IMAM OF THE [ISLAMIC] NATION APPOINTS THE MEMBERS OF ITS CENTRAL COUNCIL.

* * *

ARTICLE SEVEN: THE CAPITAL OF THE FOUNDATION

THE INITIAL CAPITAL OF THE FOUNDATION CONSISTS OF THE PROPERTIES OF THE PAHLAVI DYNASTY AND THE PROPERTIES OF THOSE FOR WHICH THE REVOLUTIONARY COURT HAS

ISSUED JUDGMENT FOR THEIR RETURN; AND THE ACCEPTANCE THEREOF BY THE FOUNDATION IS APPROPRIATE FOR THE OPPRESSED PEOPLE, AND THE VALUE THEREOF SHALL BE DETERMINED AFTER TAKING THE INVENTORY AND EVALUATING THE PROPERTIES.

* * *

ARTICLE EIGHT: THE DATE OF INCORPORATION AND THE TERM

THE DATE OF THE INCORPORATION OF THE FOUNDATION IS 1357/12/14 [MARCH 5, 1979] AND THE TERM THEREOF IS PERPETUAL.

MINUTES of the Special Meeting of the Board of Directors held on the 27th day of December, 1979, at Teheran, Iran.

The President stated that a quorum was present and that the meeting was ready to transact business.

The President then brought to the attention of the Directors that the Certificate of Incorporation should be amended in several respects, as follows: (a) that the name of the Corporation should be changed to Mostazafan Foundation of New York; (b) that the post-office address to which the Secretary of State shall mail a copy of any notice required by law is: c/o Cline, MacVean, Lewis & Sherwin, P. C., 34 Grove Street, Middletown , New York 10940, Attn: V. Frank Cline, Esq.; and (c) that the number of directors of the Corporation shall not be less than three (3) nor more than eleven (11).

After discussion, upon motion duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED, that pursuant to Section 805 of the Not-For-Profit Corporation Law, the President and the Secretary of the Corporation be, and the same are, authorized and directed to execute and file a Restated Certificate of Incorporation, which shall include the following amendments:

1. That the name of the Corporation shall be MOSTAZAFAN FOUNDATION OF NEW YORK;
2. That the number of directors of the Corporation shall not be less than three (3) nor more than eleven (11); and
3. That the post-office address to which the Secretary of State shall mail a copy of any notice required by law is: c/o Cline, MacVean, Lewis & Sherwin, P.C., 34 Grove

Street, Middletown, New York 10940, Attn: v. Frank Cline, Esq.

The President then brought to the attention of the Directors that the resignations of Director Majid Montakheb and Director V. Frank Cline, dated November 28, 1979, had been received by him and recommended that such resignations be accepted with regret, and also the resignation of Mohamad Souri as the Secretary of the Foundation but not as the member of the Board.

Upon motion duly made and seconded, it was

RESOLVED, that the Resignation of Mr. Majid Montakheb as a director of the Foundation be and the same hereby is accepted, and it is further

RESOLVED, that the Resignation of Mr. Mohamed Souri as the Secretary of the Foundation but remain as the member of the Board, and the same hereby is accepted effective December 28, 1979.

RESOLVED, that resignation of Dr. V. Frank Cline dated November 28, 1979, be and the same hereby is accepted, effective November 28, 1979.

By reason of the resignation of Majid Montakheb and Mohamad Souri as Secretary the President brought to the attention of the Directors that the Offices of the Treasurer of the Foundation and the Secretary of the Foundation are vacant and after discussion the following names were placed by President in nomination:

Dr. Hoshang Ahmadi – Secretary
Mr. Mohsen Davachi – Treasurer

for officers of the Foundation, to fill out the unexpired terms

of Majid Montakheb and Mohamad Souri until the next annual meeting of the Board of Directors. There being no further nominations, the nominations for the offices of Treasurer and Secretary of the Foundation were closed and by motion duly made, Seconded and unanimously carried out, it was

RESOLVED, that nomination for office of Secretary of the Foundation be closed and that the Secretary cast one ballot for the election of Dr. Hoshang Ahmadi as the Secretary of the Foundation.

RESOLVED, that nominations for the Office of Treasurer of Foundation be closed and that the Secretary cast one ballot for election of Mr. Mohsen Davachi as Treasurer of the Foundation.

The President brought to the attention of the Directors the necessity of designating trusted employees of the Foundation to sign checks and other authorizations for the conduct of business of the Foundation, and after discussion, and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that Madoucher Shafie, as President of the Foundation be and be hereby is authorized to designate, in his discretion, trusted employees of the Foundation to execute authorizations and to sign checks and drafts of the Corporation for the purpose of the Conduct of normal business of the Foundation, said designations to be effective for such period as the President shall designate and terminable at his pleasure.

The President brought to the attention of the Directors the necessity of the selection and election of a Scholarship Committee for the purpose of review and selection of Scholarship applicants, and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the President be and be hereby is authorized in the name of the Foundation to select and appoint a Scholarship Committee and to specify Rules and Regulations for the action of such Committee in the review and selection of Scholarship applicants.

The President brought to the attention of the Directors certain actions taken by the President in the name of the Foundation which the President requested be ratified by the Directors. General discussion was had thereon and by motion duly made, seconded and unanimously carried, it was

RESOLVED, that the following actions taken by the president of the Foundation, in the name of the Foundation hereby are ratified and approved:

(a) Discharge of Sutton & Towne, Inc. as Building Management Agent for the Foundation;
(b) Execution of a Building Management Contract with Williams Real Estate Company, Inc.
(c) Execution of various leases of portions of the rentable area of 650 Fifth Avenue;
(d) Modification of the lease with National Iranian Oil Company involving reduction of space leasing to said company;
(e) Discharge of Briscoe Construction Co. Inc. as construction manager and tenant work contractor.
(f) Execution of contract with V. Frank Cline as General Counsel of the Foundation
(g) Execution of Contract with Cline, MacVean, Lewis & Sherwin, P.C. , as attorneys for the Foundation;
(h) Cancellation or Modification of certain leases including litigation concerning the same;
(i) Execution of a contract with Directional Business Corporation as Tenant work contractor;
(j) Other actions taken by the President in the name of the Foundation of a similar nature.

The President brought to the attention of the Directors the necessity of holding meetings of the Foundation from time to time and the difficulty of obtaining a quorum for the conduct of such business, and his recommendation that the By-Laws of the Foundation be modified to simplify this procedure. General discussion was had and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that Article II, Section (9) of the By-Laws of Pahlavi Foundation, be modified to provide that one-third of the Directors in office, but not less than three (3) shall constitute a quorum for the transaction of business.

The President discussed the negotiations undertaken by him with Briscoe Construction Co. Inc. relating to the settlement of the claims of Briscoe Construction Co. Inc. presently in arbitration, and including both the liens of Briscoe Construction Co. Inc. and all subcontractors and materialmen claiming under Briscoe Construction Co. Inc. and advised the Directors that a settlement agreement had been negotiated relating to all such claims including the claims set forth in the liens filed by Briscoe Construction Co. Inc. and others claiming under them, and the claims for the cost of completion, of the building structure and unpaid balances of tenant work, said negotiated settlement being in the total sum of $1,830,000.00 of which $1,550,000.00 was allocated to the liens and the balance to the final payment for construction of the building and the tenant work done. Following general discussion and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the President be and he hereby is authorized to negotiate and conclude a settlement of the claims of Briscoe Construction Co. Inc. and all lienholders claiming under Briscoe Construction Co. Inc. along with the claims for final construction costs of the building at 650 Fifth Avenue, New York, and or claims for tenant work performed

by Briscoe Construction Co. Inc. in the total sum of $1,830,000.00.

The President brought to the attention of the title insurance policy should be procured for 650 Fifth Avenue, New York City and on motion unanimously carried it was

RESOLVED, that the President be and he hereby is authorized to procure from a licensed title insurance company a title insurance policy covering the premises located at 650 Fifth Avenue in New York City.

The President brought to the attention of the Directors that numerous leases for rental space in 650 Fifth Avenue, New York City are in work and may be required to be executed from time to time and, further that design and layout of rental area in some of the floors, particularly the concourse, main floor and mezzanine level are under consideration for making them available as rentable space in order to procure the largest rate available from them. General discussion was had on the foregoing, and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the President be and he hereby is authorized in his discretion and in the name of the Foundation to enter into negotiations, planning and such contracts as may be required for the purpose of utilizing all rentable areas in the Building located at 650 Fifth Avenue, New York City which in his opinion will result in the greatest return of income to the Foundation for rental of said spaces and the President be and he hereby is encouraged to proceed with such negotiations, planning and such contracts as may be required in order to accomplish the foregoing .

The President brought to the attention of the Directors the Foundation's need for office space is acute and that such space may be available at a location other than at 650 Fifth

Avenue New York City at said location, and after general discussion thereof by motion duly made, seconded and unanimously carried, it was

RESOLVED, that the President be and he hereby is authorized to lease or sublease such premises at such location as the President in his discretion deems to be for the advantage of the Foundation for the purpose of establishing the Foundation's offices and that he be authorized to execute such contracts and leases for such purposes as in his discretion are required.

There being no further business, the meeting was adjourned.

Dated: December 27, 1979. [signed]

(2)

98-563

No. 98-567

FILED
OCT 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NORMAN GABAY,

Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
and
MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a/ The Alavi Foundation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT MOSTAZAFAN FOUNDATION OF IRAN'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-567

NORMAN GABAY,

Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
and
MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a/ The Alavi Foundation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT MOSTAZAFAN FOUNDATION OF IRAN'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Nature of the Suit

Petitioner ("Gabay") brought suit in the district court below against the Mostazafan Foundation of Iran ("Iranian Foundation") and the Alavi Foundation of New York ("New York Foundation"), seeking compensation for the nationalization of his properties in Iran.

Gabay's instant petition seeks this Court's review of the Second Circuit's summary order affirming the district court's

dismissal of the suit for want of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). (Pet. App. 2A-3A).

The Iranian Foundation is a charitable institution established by the Iranian revolutionary government in 1979. Its purpose is to administer and liquidate properties of the former Pahlavi Dynasty, of individuals who had illegally accumulated wealth during the Pahlavi regime and of those who had left Iran after the revolution. (Pet. App. 50A-51A). The Iranian Foundation's charter grants no judicial or seizure powers to it. Properties turned over to the Iranian Foundation were seized pursuant to orders issued by revolutionary courts established in 1979. The proceeds from the sales of seized properties are used to support poor and destitute people in Iran. The Iranian Foundation never had a presence in the United States, nor has it ever conducted business in the United States.

The New York Foundation is a non-profit corporation incorporated under New York law in 1973 for charitable, philanthropic, educational, and civic purposes. It was originally named "Pahlavi Foundation", but its name was changed after the Iranian revolution to "Mostazafan Foundation of New York" because its board did not wish to be identified with the Pahlavis. ("Mostazafan" in Farsi means "oppressed"). It was renamed in 1992 as "Alavi Foundation of New York," it present name. From its inception, the New York Foundation's board was composed of U.S. nationals and New York residents.

The New York Foundation is wholly separate and distinct from the Iranian Foundation. The latter never had an interest, direct or indirect, in the property of the New York Foundation, nor has it ever directed, overseen or controlled the New York Foundation.

B. Petitioner's Jurisdictional Theory

Gabay sought to vest jurisdiction in the District Court against the Iranian Foundation under the FSIA's "expropriation exception" to sovereign immunity, 28 U.S.C. §1605(a)(3). His complaint asserted that the Iranian Foundation and the New York Foundation were agencies or instrumentalities of Iran within the meaning of §1603(b) of the FSIA; that the Iranian Foundation had expropriated his properties in Iran and owned and operated them; that the New York Foundation was a mere agent or alter ego of the Iranian Foundation engaged in "commercial activity" in New York on behalf of its principal; and that because of the alter ego relationship, the Iranian Foundation itself should in law be regarded as engaging in commercial activity in New York. Thus, it was the core of Gabay's jurisdictional hypothesis that since the Iranian Foundation owned his properties in Iran and because it engaged in business in New York through its agent, the New York Foundation, it was subject to suit for the wrongful taking of Gabay's properties in Iran under the second sentence of the expropriation exception codified in §1605(a)(3) of the FSIA.[1]

---

[1] The second sentence of §1605(a)(3) provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

> (3) in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

C. The Proceedings in the Courts Below

1. The case was originally assigned to the Honorable Kimba M. Wood. The Iranian Foundation moved to dismiss the suit for lack of jurisdiction under the FSIA, and the New York Foundation moved to dismiss for failure to state a claim and, alternately, for summary judgment. In an opinion and order issued on October 15, 1993, Judge Wood denied both defendants' motions without prejudice and ordered limited jurisdictional discovery.[2] She ruled that Gabay had the burden of establishing the claimed alter ego relationship between the New York Foundation and the Iranian Foundation as his complaint asserted. Judge Wood reviewed painstakingly the principles under which the separate status of foreign governmental agencies or instrumentalities may be disregarded. (151 F.R.D. at 253-54, Pet. App. at 19A-21A). She emphasized that Gabay had the burden of overcoming the New York Foundation's presumption of separateness, and establishing by probative evidence that the alleged principal, the Iranian Foundation, exercised control over the day-to-day

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[2] Judge Wood stated in relevant part:

> . . . [T]he equities weigh in favor of permitting discovery in this case because the risk of significant encroachment on a foreign instrumentality's immunity from suit is slight. Under plaintiff's alter ego theory, discovery is likely to be directed primarily toward the New York Foundation, an entity incorporated under the laws of the State of New York over which this court unquestionably has jurisdiction. If defendants are proved correct that the two foundations are separate entities, there will have been no serious threat to the Iranian Foundation's immunity; if plaintiff is proved correct, discovery will have enabled him to seek relief for a serious wrong.

Gabay v. Mostazafan Foundation of Iran, 151 F.R.D. 250, 257 (S.D.N.Y. 1993), *reproduced in* Pet. App. at 27A.

activities of the New York Foundation, its alleged agent. (151 F.R.D. at 257, Pet. App. at 25A).

2. For over two years following Judge Wood's ruling, the Iranian Foundation and the New York Foundation responded to Gabay's voluminous discovery requests. Gabay served on both foundations extensive interrogatories, requests for admissions and demands for the production of a large volume of documents. In addition, with respect to the New York Foundation, Gabay took the depositions of its present and past directors, some present and former employees, and of former Secretary of State William Rogers who had served on the board of the New York Foundation. With regard to the Iranian Foundation, Gabay initially demanded that six of its past and present chief executives be produced for depositions in New York. Because of the United States government's restrictions on travel by Iranian officials to this country, the Iranian Foundation produced in Europe Mr. Abass Khadjeh-Piri, the Iranian Foundation's vice-president and general counsel, as its Rule 30(b)(6) witness. Mr. Khadjeh-Piri was also examined at length by Gabay's counsel on matters that he had addressed in a declaration submitted in support of the Iranian Foundation's original motion to dismiss.

The evidence produced by the two foundations during the discovery established incontrovertibly that there existed no "alter ego" relationship between the Iranian Foundation and the New York Foundation. The latter is a not-for-profit corporation existing under the laws of the State of New York. It has no owner, and its property is used exclusively for charitable purposes in accordance with its certificate of incorporation and by-laws, and subject to the supervision by the authorities of the State of New York. In the event of its dissolution, its net assets would escheat to the State. Its directors are elected by its board and they act independently

of any other entity. It provides its own financing. It hires its own employees. It maintains its own bank accounts. It prepares its own tax returns and maintains its own books and financial records. Not a scintilla of evidence was produced by Gabay to show that the Iranian Foundation had any relationship with, or control over, the New York Foundation.

A further fatal flaw in Gabay's jurisdictional hypothesis emerged only during discovery: not only was Gabay's assertion that the Iranian Foundation itself seized Gabay's property untrue, but unimpeached testimony and unchallenged documentary evidence established that the Iranian Foundation did not *own or operate* the property taken from Gabay.

In 1995, while the jurisdictional discovery was still in progress, the case was reassigned to the Honorable Sidney H. Stein. Following completion of the discovery, both foundations renewed their original dispositive motions.

3. On June 4, 1997, Judge Stein ruled that he lacked subject matter jurisdiction over the Iranian Foundation under the FSIA's expropriation exception to sovereign immunity. (Pet. App. 4A-13a).

In his opinion and order, Judge Stein summarized Judge Wood's earlier thorough analysis of the FSIA and the circumstances under which a foreign governmental agency's separate juristic personality could be disregarded. (Pet. App.9A-11A). He adhered to Judge Wood's ruling that to establish an alter ego relationship between two separate and independent agencies of a foreign state, a claimant must show that the dominant agency exercised control over the day-to-day activities of the alleged alter ego or agent (*id.* at 10A). He concurred in Judge Wood's holding that under this Court's applicable law a plaintiff "has the burden of overcoming the presumption of independence on the part of defendant

foundations," citing *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, ("*Bancec*") 462 U.S.611 (1983). (*Ibid.*).

Judge Stein rejected Gabay's renewed attempt to distinguish this Court's holding in *Bancec*. Gabay argued — as he does again in his petition here — that the presumption of separateness should be applied only to relationships between a foreign state and one of its separate agencies or instrumentalities, but not to the relationship between two separate state agencies. After analyzing the *Bancec* holding, Judge Stein concluded that "[n]o cause has been shown to abandon Judge Wood's determination that the pivotal issue is whether the Iranian Foundation exercised control over the day-to-day activities of the New York Foundation." (*Ibid.*)

Turning to the evidence adduced during discovery (Pet. App. 11A), Judge Stein concluded that "Gabay has put forward insufficient evidence of day-to-day control [by the Iranian Foundation over the New York Foundation] to establish subject matter jurisdiction within the purview of the FSIA." (*Id.* at 13A). He, therefore, granted the Iranian Foundation's motion to dismiss for want of jurisdiction under the FSIA, and the New York Foundation's motion for summary judgment for failure to state a justiciable claim.(*Ibid.*). Judge Stein did not address the additional evidence produced by the Iranian Foundation establishing that it did not own or operate the property that was seized, as Gabay's complaint asserted. To maintain an action against the Iranian Foundation under the second sentence of §1605(a)(3), Gabay had the burden of establishing that fact.

The Second Circuit summarily affirmed the district court's dismissal of the suit on the ground that "Gabay has offered insufficient evidence to overcome the presumption of independence between defendants Mostazafan Foundation of

Iran and Mostazafan Foundation of New York." (Pet. App. 2A). That court, too, did not enter into a discussion of the Iranian Foundation's lack of ownership or operation of the seized properties.

REASONS FOR DENYING THE WRIT

1. The decision below was a plainly correct application of settled agency and alter ego law. Gabay's fact bound claim that the courts below erred in not attributing the New York Foundation's charitable activities in New York to the Iranian Foundation in Tehran is devoid of substance.

Despite his herculean efforts during discovery, Gabay failed to produce any probative evidence that would tend to show the New York Foundation was or is controlled or directed by the Iranian Foundation or in any other way subservient to the latter. In consequence, the district court was right in dismissing the action against the Iranian Foundation for lack of subject matter jurisdiction under §1605(a)(3) of the FSIA, and the Second Circuit was correct in summarily affirming the disposition below. Plainly, the Iranian Foundation does not engage directly or through an agent or alter ego in any commercial activity in the United States which alone would permit the maintenance of this suit under the FSIA's expropriation exception.

2. In the leading case of *Bancec*, this Court applied general principles of corporate law to the question of whether a foreign corporation and a foreign government were alter egos. The Court emphasized that as a general matter the legal separateness of corporations owned or created by foreign governments must be respected:

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the

> instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. . .
>
> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

Id. At 624, 626-27 (citations and footnotes omitted). The *Bancec* Court was, however, at pains to make clear that in certain narrowly circumscribed situations it is appropriate to disregard the separate legal status of the corporation and

permit recovery from the government for the liabilities of the corporation. The Court offered several examples of situations in which the legal separateness conferred by the corporate form may be disregarded:

> Where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of another. In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice."

In the years since the *Bancec* decision, lower courts have found an alter-ego relationship in the foreign sovereign context in two situations. The first situation arises where the government has "assumed day-to-day operation of the instrumentality which it owns." *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989); *see also Walter Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375, 1382 (5th Cir. 1992); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F.Supp. 289, 294 (S.D.N.Y. 1987); *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F.Supp. 660,666 (W.D. Mich. 1985). The second situation arises where "there has been an abuse of the corporate form." *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 564 (11th Cir. 1987); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 86 L. Ed. 2d 273, 105 S. Ct. 2656 (1985); *Baglab*, *supra*.

In the absence of probative evidence compelling the conclusion that one of these situations has arisen, the courts below were plainly correct in rejecting Gabay's hypothesis

that the New York Foundation was an agent or alter ego of the Iranian Foundation and that, in consequence, the Iranian Foundation engaged in business in this country through its agent.

3. Gabay contends that the teachings of *Bancec* as to when the activities of an agency of a foreign state can be attributed to the foreign state itself should be discarded when dealing with two agencies or instrumentalities of a foreign state. (Pet. at 20-22). His proposed distinction is without authoritative support and does not withstand scrutiny. Regardless of whether certain acts of an independent agency are to be attributed to a foreign state or to another separate agency, there must be some showing that such acts were in fact performed by the putative agent on behalf of its alleged principal, or pursuant to the direction or control of the principal. The record below is barren of any such showing.

4. Gabay's concern that the "day-to-day control" test used by the courts below will create a "safe harbor for outlaws" is devoid of substance. He claims that "there is evidence that entities like the Mostazafan Foundation of Iran are covertly taking advantage of the American legal system through agents over which they exercise general control and supervision." (Pet. at 22).

The contention is nothing but consummate hyperbole, since Gabay has produced not a speck of evidence that the Iranian Foundation is "covertly taking advantage" of American law. Its sole contact with the American legal system has been its overt appearance in this action.

CONCLUSION

The concurrent findings by the courts below are fully supported by the record evidence and are correct as a matter of law. This petition does not present a case that warrants review under any of the guidelines set forth in Rule 10 of this Court's Rules. Accordingly, the petition should be denied.

Dated: October 30, 1998

Respectfully submitted,

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No. 98-567

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1998

NORMAN GABAY,

Petitioner,

- v -

MOSTAZAFAN FOUNDATION OF IRAN and
MOSTAZAFAN FOUNDATION OF NEW YORK,
a/k/a THE ALAVI FOUNDATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT ALAVI FOUNDATION SUED HEREIN AS THE MOSTAZAFAN FOUNDATION OF NEW YORK

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20 pp

QUESTION PRESENTED

Did the courts below misapply the day-to-day control test enunciated by this Court in First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983), as required by the immunity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(3) to determine the question of a foreign entity's alleged control of a New York not-for-profit corporation?

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STATEMENT OF THE CASE

This lawsuit is the third proceeding that petitioner has initiated regarding property he alleges was expropriated in Iran. Each of petitioner's claims in those prior proceedings were dismissed. Petitioner's first claim was brought under a pseudonym in the United States District Court for the Central District of California: *Bernard G. Martin, a pseudonym v. Government of Iran, et al,* 81 Civ. 6501 (RJK) (N.D. Cal.) (hereinafter "California Complaint"). Petitioner's California Complaint, which was dismissed without prejudice in February 1982, alleges that the Iranian government seized control and possession of his property. No mention of the Alavi Foundation is made in petitioner's California lawsuit.

On January 19, 1982, petitioner initiated his second proceeding, an arbitration claim in the United States-Iran Claims Tribunal ("Claims Tribunal") in the Hague,[1] alleging that the Iranian Government and the Mostazafan Foundation of Iran allegedly expropriated his property. *Gabay v. Iran,* Award No. 515-771-2, 27 Iran-U.S.C.T.R. 40, 41 (July 10, 1991). No mention of the Alavi Foundation is made in petitioner's arbitration claim.

While petitioner asserted before the Claims Tribunal that his property was taken in 1980 and submitted papers to support this claim, these documents were found to be forgeries because the dates had been altered. Accordingly,

---

[1] In February 1981, President Ronald Reagan ordered the suspension of litigation in United States courts against the Iranian Government for claims arising before January 19, 1981. 31 C.F.R. § 535.222. An arbitral body, the Claims Tribunal, was established to decide claims of American citizens against Iran. The jurisdiction of the Claims Tribunal only extended to claims arising on or before January 19, 1981.

the Claims Tribunal dismissed petitioner's claim for lack of jurisdiction.

Petitioner's third proceeding is the matter currently before this Court. On September 22, 1992 petitioner sued the Mostazafan Foundation of Iran and the Alavi Foundation alleging that between 1981 and 1983 the Mostazafan Foundation of Iran expropriated petitioner's property in Iran. Petitioner claimed jurisdiction pursuant to 28 U.S.C. § 1330 and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S,C. §§ 1605(a)(2) and 1605(a)(3). As was the case in his two prior proceedings, petitioner was represented by counsel (Baker & McKenzie) throughout the proceeding in the district court below. In lieu of answering, both the Alavi Foundation and the Mostazafan Foundation of Iran moved to dismiss.

Considering only the issue of subject matter jurisdiction Judge Wood ruled on October 15, 1993 that petitioner was unable to show subject matter jurisdiction under 28 U.S.C. § *1605(a)(2)*. *Gabay v. Mostazafan Foundation of Iran, et al, 151* F.R.D. 250, 255 n.8 (S.D.N.Y. 1993). Petitioner was permitted, however, to conduct discovery on the issue of "whether the [Mostazafan Foundation of Iran] exercised control over the day-to-day activities of the [Alavi Foundation"] sufficient to satisfy the requirements of 28 U.S.C. § 1605(a)(3). *Gabay,* 151 F.R.D. at 257.

Three years later, after petitioner had taken seven depositions and after the Alavi Foundation produced more than 15,000 documents, respondents renewed their substantive motions. The Alavi Foundation moved for summary judgment based on lack of subject matter jurisdiction, failure to state a prima facie case, and statute of limitations grounds. The Mostazafan Foundation of Iran

moved pursuant to Fed. R. Civ. P. 12(b)(1) and (2), or in the alternative, for summary judgment based on lack of subject matter and personal jurisdiction and the statute of limitations.

On June 5, 1997, Judge Stein, to whom this case was reassigned, granted respondents' motions based on petitioner's failure to establish subject matter jurisdiction. Judgment was entered on June 6, 1997 and petitioner's notice of appeal to the United States Court of Appeals for the Second Circuit was filed on July 2, 1997. Petitioner's counsel moved to be relieved as soon as the notice of appeal was filed.

On May 5, 1998, the United States Court of Appeals for the Second Circuit (Graafeiland, Meskill, Cabranes, JJ per curiam) affirmed the District Court decisions by summary order because petitioner failed to offer sufficient evidence to overcome the presumption of independence between respondents Mostazafan Foundation of Iran and the Alavi Foundation as required by *First Nat'l City Bank v Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) ("*Bancec*")

On July 30, 1998, Justice Ruth Bader Ginsberg granted petitioner's application for an extension of time in which to file his petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Because petitioner failed to assert any of the established bases for granting certiorari, this Court should deny his writ. One, petitioner has failed to assert that the decision of the Court of Appeals involves an area of conflict among the circuit courts. Two, similarly, petitioner has failed to assert that the Court of Appeals misapplied Supreme Court precedent on an important federal question, or that the Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Supreme Court. Three, petitioner has failed to assert that the Court of Appeals acted in any way as to require the exercise of this Court's supervisory power. Fairly stated, petitioner seeks review in this Court to overturn *Bancec* even though no conflicts or misinterpretations of this fifteen-year old precedent exist. According to petitioner, reversal of *Bancec* is required because given the facts here, he cannot meet the minimum standards articulated in *Bancec* for subject matter jurisdiction under 28 U.S.C. § 1605(a)(3).

Petitioner's basis for subject matter jurisdiction under 28 U.S.C. § 1605(a)(3) rested on the allegation that the Mostazafan Foundation of Iran, which he claimed expropriated his property, was the same entity as the Alavi Foundation, a New York not-for-profit corporation. Looking to applicable laws, especially *Bancec,* the lower courts required petitioner to show the exercise of "day-to-day" control by the Mostazafan Foundation of Iran over the Alavi Foundation. After petitioner wholly failed to present evidence on this issue, the lower courts properly ruled that they lacked subject matter jurisdiction over petitioner's expropriation claim.

The courts below, following *Bancec* and its progeny: (i) applied the correct legal standard for evaluating the

alleged alter ego status of the Alavi Foundation; and (ii) properly recognized that petitioner had the burden of overcoming the presumption of independence. As one of the courts below stated, this Court in *Bancec* "suggested two situations in which the presumption of separateness might be overcome: (i) when 'a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created; and (2) when recognizing separateness of the agency or instrumentality would work a fraud or injustice.'" *Gabay*, 151 F.R.D. at 253, Reasoning that the presumption of separateness in this case would work a fraud or injustice only if the Alavi Foundation is "an illusory corporate fiction, which plaintiff has yet to establish," *id.* at 254, the courts below rightly held that only the first test applied here. Having failed to overcome the presumption of independence after extensive discovery, petitioner now wants this Court to abandon established precedents and find, based solely on petitioner's unsupported allegations, that the presumption of independence and the application of the day-to-day control test will lead to injustice. Such assertions are insufficient grounds for granting petitioner's writ.

The rulings below that petitioner failed to demonstrate the Mostazafan Foundation of Iran's control over the day-to-day activities of the Alavi Foundation are well-supported by the evidence. Petitioner is incorrect when he asserts that there was no dispute over the current ownership of his property because uncontroverted evidence shows that petitioner's property was confiscated by the Iranian judiciary and was given to an entity that has no ties to the Mostazafan Foundation of Iran, let alone the Alavi Foundation. Thus, jurisdiction over the Alavi Foundation also was lacking because the relevant section of the FSIA, which permits certain suits based on the expropriation of property, only applies if that property "is owned or operated by an agency or instrumentality of the foreign state and that agency or

instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (emphasis supplied).

I. THE DECISIONS BELOW DO NOT RAISE AN IMPORTANT ISSUE THAT CALLS FOR THIS COURT'S REVIEW.

The precedents upon which the decisions below turn are well-settled and present no area of conflict among the circuit courts. Nor does a question of federal law exist as a result of this case that has not been previously settled by this Court. In *Bancec*, this Court, adhering to the language of the FSIA and following precedent arising in similar corporate setting, accorded a presumption of independence to instrumentalities of a foreign state that only can be overcome if the instrumentality is so extensively controlled by its owner that a relationship of principal and agent is created or if to maintain the presumption would work fraud or injustice. 462 U.S. at 628. As in this case, this presumption is the more vital when the alleged agent, and the entity on which petitioner presumably seeks to impose liability, is organized under the laws of a state of the United States.

Petitioner not only failed to satisfy either of the *Bancec* criteria with regard to the Alavi Foundation in the courts below, but petitioner fails to identify for this Court any decisions that are inconsistent with the lower courts' application of *Bancec* to analogous factual circumstances. Similarly, petitioner's claim that the lower courts misapplied Supreme Court precedent is not substantiated by other decisions that demonstrate differing applications to similar factual circumstances. Petitioner simply has relied on unsupported conclusory arguments of "injustice" and asks this Court to overturn *Bancec* regarding which no conflict or ambiguity exists.

II. THE LOWER COURTS CORRECTLY APPLIED THE DAY-TO-DAY CONTROL TEST FOR OVERCOMING THE PRESUMPTION OF INDEPENDENCE BETWEEN GOVERNMENT INSTRUMENTALITIES UNDER *BANCEC.*

Liberally construed, petitioner asserts two justifications for review by this Court: (1) by applying the day-to-day control test, the lower courts misapplied *Bancec* to the specific facts of this case; (2) by not finding fraud or injustice, the lower courts did not give proper weight to petitioner's evidence. Petitioner is wrong on both grounds.

1. *Bancec,* As Applied By The Lower Courts, Governs This Case.

(a) An Agent-Principal Standard Must Include a Day-to-Day Control Test

In the courts below, petitioner sought to satisfy the jurisdictional requirement of 28 U.S.C. § 1605(a)(3) -- that the accused foreign state's agency or instrumentality is engaged in commercial activity in the United States -- by claiming that the Mostazafan Foundation of Iran and the Alavi Foundation are the same entity and have an agent-principal relationship.

The courts below correctly looked to *Bancec* for guidance on the standard for exercising jurisdiction over a foreign state's instrumentality. Petitioner's theory always has been that the Alavi Foundation is an alter-ego of the Mostazafan Foundation of Iran. *Gabay*, 151 F.R.D. at 254. Following *Bancec,* the district court presumed that the Alavi Foundation is a separate entity, *see Bancec,* 462 U.S. at 626-27; *Foremost-McKesson v. The Islamic Republic of Iran,* 905

F.2d 438, 440 (D.C. Cir. 1990); *De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985), and held that the Alavi Foundation's status as a separate and distinct entity could not be ignored absent a showing that the Mostazafan Foundation of Iran exercised day-to-day control over the Alavi Foundation. Petitioner conducted intensive jurisdictional discovery on the question of "day-to-day control" mandated by *Bancec* and after failing to adduce any evidence to support his theory, petitioner now disputes the standard and claims that discovery below was guided by the wrong interpretation of *Bancec*. (Petitioner's Brief at 9-12).

The agent-principal standard articulated by *Bancec*, and applied by most courts through a day-to-day control test, is necessary to satisfy the jurisdictional requirement of 28 U.S.C. § 1605(a)(3). The test serves to ensure that to obtain jurisdiction over a foreign state allegedly involved in the expropriation of a plaintiff s property, that "property must be owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Petitioner's artificial distinction between the purposes of the "expropriation exception" and those of the "commercial activities exception" under the FSIA is a red herring. The standards applied by the lower courts in this case have been used by other courts under the expropriation exception of FSIA. See, e.g. *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 660, 666 (W.D. Mich. 1985).

Courts interpreting *Bancec* have consistently applied a day-to-day control test to determine the independence of a foreign state instrumentality under the FSIA. *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996)

(jurisdiction found when foreign government exercised day-to-day control because it appointed six of seven corporate directors); *Hester Int'l Corp. v. Federal Rep. of Nigeria*, 879 F.2d 170 (5th Cir. 1989); *Minpeco, S.A. v. Hunt*, 686 F. Supp. 427,428 (S.D.N.Y. 1988) (day-to-day control over instrumentality's operations is more significant than broader control such as appointing directors and officers); *Baglab Ltd. v. Johnson Malthey Bankers Ltd.*, 665 F. Supp. 289 (S.D.N.Y. 1987) (no jurisdiction when foreign state bank ceased to exercise day-to-day control by replacing and restructuring the management of the alleged alter ego); *Kalamazoo*, 616 F. Supp. at 665 (jurisdiction and immediate control found when foreign government required all checks in excess of $25,000 be signed by government appointee). As these cases demonstrate, to meet the jurisdictional requirement of the 28 U.S.C. § 1605(a)(3), a day-to-day control test, as used by the courts below, must be applied to the foreign government and its alleged instrumentality.

Without any factual support, petitioner argues that this Court should abandon the presumption that incorporated entities are separate from each other or the requirement that a plaintiff making a claim under the FSIA prove, at a minimum, some sort of nexus between the foreign state and its alleged instrumentality. (Petitioner's Brief at 13-14.) Petitioner further argues that this Court should abandon these standards and impute to the Alavi Foundation the activities and control of the Mostazafan Foundation of Iran. (Petitioner's Brief at 20.) The courts below correctly rejected these arguments and this Court should do the same because case law has repeatedly recognized the presumption of separateness following *Bancec*, whether or not a foreign government is not directly involved in the claim. *See, e.g., Federal Ins. Co, v. Richard I. Rubin & Co., et al.*, 12 F.3d 1270, 1286-87 (3d Cir. 1993), *cert. denied sub nom. E jay Travel, Inc, v. Algemeen Burgerlijk Pensioenfonds*, 511 U.S.

1107 (1994) (applying *Bancec* to determine relationship between instrumentality and its subsidiaries).

Given the importance which Congress attached to the immunity of government instrumentalities, the FSIA should be interpreted literally and should not be misconstrued as petitioner suggests in his petition. See *Bancec*, 462 U.S. at 627-28; *Jet Line Services, Inc. v. M/V Marsa El Hariga et al.*, 462 F. Supp. 1165, 1170 (D. Md. 1978) (FSIA codified the restrictive theory of sovereign immunity both in terms of its general application as well as all relevant exceptions). The FSIA clearly extends immunity to instrumentalities by including them in the definition of foreign states. 28 U.S.C. § 1603(a),(b). Moreover, as this Court has observed, "[s]eparate legal personality has been described as 'an almost indispensable aspect of the public corporation'." *Bancec*, 462 U.S. at 625. Indeed, "[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign [the alleged alter ego], and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's [the alleged alter ego's] guarantee." *Id.* at 626. Congress' concern to protect an instrumentality's ability to conduct its own affairs is equally strong, probably more so, under the facts of this case when the evidence has shown no links between the two foundations.

b) Recognizing Separateness of the Agency or Instrumentality from the Foreign State Does Not Work a Fraud or Injustice.

Throughout his brief, petitioner insists on embracing *Bancec's* discussion of injustice yet he presents no basis to abandon *Bancec* and its requirement of day-to-day control. Petitioners claim of injustice was correctly rejected below,

Gabay, 151 F.R.D. at 254 n.5, because there was no injustice in regarding the Mostazafan Foundation of Iran and Alavi Foundations as separate unless the foundations were alter egos. This is precisely what this Court said in *Bancec*. *Bancec*, 462 U.S. at 628. Petitioner attempts to skip the necessary legal step of establishing an alter ego relationship and baldly states that there should be no presumption of separateness because somehow a serious injustice is being perpetrated if such presumption is upheld.

Petitioner has no proof that the Mostazafan Foundation of Iran is covertly taking advantage of the American legal system through the Alavi Foundation. Indeed, such unfounded allegations, made without legal or factual support were insufficient to win reversal of the judgment entered below, and should not be entertained by this Court. The universally accepted teaching of *Bancec* is that, in dealing with the issue of an alleged alter-ego for purposes of exercising jurisdiction over a foreign government's instrumentality, the rule is a presumption of separateness and this rule may be overcome, in certain circumstances, by the fraud or injustice exception. This Court's cautionary note, referred to in petitioner's writ, articulates this very teaching. To overcome the obvious weakness in his case, however, petitioner suggests that this Court expand the scope of the exception so much so that the exception swallows the rule.

The undisputed fact remains that after three years of discovery petitioner was unable to produce any evidence showing that the two foundations are linked in any way. Petitioner was unable to substantiate his allegations of injustice precisely because no control exists between the two foundations.

2. Petitioner's Evidence Does Not Demonstrate That the Mostazafan Foundation of Iran Exercises Any Control over the Alavi Foundation

Petitioner has failed both to meet the well-settled standards enunciated in *Bancec,* or to raise an alternative legal standard that he can convincingly satisfy. Petitioner's assertions in his writ as well as in his appeal below amount to speculation and conjecture insufficient to defeat summary judgment. The evidence established through the discovery process is undisputed:

(i) The Alavi Foundation is a not-for-profit corporation registered pursuant to New York State law and has no owner. The Alavi Foundation's main purposes, among others listed in its certificate of incorporation, are to render voluntary support by means of grants and contributions to exempt organizations that benefit the aged, sick and indigent; to establish scholarships, fellowships, prizes and research awards to support the study and promotion of the arts and; to contribute to religious instructions regardless of creed in order to promote understanding and harmony among persons of all faiths;

(ii) The property of the Alavi Foundation is managed by the foundation and is used in accordance with its certificate of incorporation and by-laws. The Alavi Foundation had no involvement with the alleged expropriation of petitioner's property;

(iii) The Alavi Foundation's directors are duly and correctly elected by the foundation's own board according to New York State law;

(iv) The minutes of the Alavi Foundation's August 27, 1979 meeting that are attached to petitioner's brief were

prepared by lawyers at Rogers & Wells. Former Secretary of State William P. Rogers was a member of the Alavi Foundation's board through August 1979. As he confirmed in his deposition, Mr. Rogers resigned from the Alavi Foundation's board when it became important for the board to meet on a more regular basis. Petitioner's inference that the Mostazafan Foundation of Iran somehow controlled Mr. Rogers' decision is not only unreasonable, but truly preposterous;

(v) There is no evidence of any direct or indirect influence or control, much less the required "day-to-day control." The Mostazafan Foundation of Iran has never been present at any of the Alavi Foundation's directors meetings. The business activities of the Alavi Foundation have been conducted by its own directors. The evidence and deposition testimony established that none of the officers and directors of the Alavi Foundation are agents, officials, officers or employees of the Mostazafan Foundation of Iran. No one on the Alavi Foundation's board is authorized to vote on behalf of the Mostazafan Foundation of Iran;

(vi) The Alavi Foundation is financially independent of the Mostazafan Foundation of Iran. The Alavi Foundation is not undercapitalized and petitioner recognized in the court below that funding for the Alavi Foundation's activities comes from the rental income it receives from the interest it owns in a commercial office building. The Alavi Foundation has been responsible for its own debts and the Mostazafan Foundation of Iran has not guaranteed the Alavi Foundation's debts nor provided any funds to the Alavi Foundation;

(vii) The Alavi Foundation is not a sham corporation. The Alavi Foundation hires its own employees; its employees are not bound by the same rules and

regulations that the Mostazafan Foundation of Iran imposes on its employees. The Alavi Foundation maintains its own separate bank accounts and prepares its own tax, accounting and financial information. The Alavi Foundation and the Mostazafan Foundation of Iran do not share office space.

In the face of this uncontrovertible evidence, petitioner seeks to escape the *Bancec* day-to-day control standard rather than satisfy it. The weaknesses of petitioner's case, however, are not grounds for this Court to accept his petition of certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 2,1998

Respectfully submitted,
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98-563

No. ~~98-367~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NORMAN GABAY,
Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
a/k/a The Foundation for the Oppressed,
an agency or instrumentality of the Islamic Republic of Iran,
and
MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a The Alavi Foundation,
an alter ego of the Mostazafan Foundation of Iran,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Understandably, perhaps, Respondents have repeatedly and profoundly mischaracterized this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611 (1983) ["*Bancec*"], and repeatedly sought to distract the Court with factual issues that are not presented by the petition for certiorari (and which would be addressed, if at all, only on remand from this Court). Oddly, Respondent Mostazafan Foundation of Iran

has even offered a gross and bizarre misstatement of the argument in the petition for certiorari. *Cf.* Pet., pp. 20-22 *with* Brief in Opp. of Mostazafan Foundation of Iran, p. 11 (citing Pet., pp. 20-22).

What Respondents have not done is to answer our central legal argument: that the courts below inadvertently created a safe harbor for international outlaws by ignoring the important distinction that Congress drew between cases brought under the "expropriation exception" and those brought under the "commercial activities exception" of the Foreign Sovereign Immunities Act ["FSIA"]. Attempting to make light of this argument, Respondent Mostazafan Foundation of Iran calls it "consummate hyperbole." Brief in Opp. of Mostazafan Foundation of Iran, p. 11. Such language is obviously not an argument, or a useful substitute for an argument. Nor is such language accurate.

The Mostazafan Foundation is an agency or instrumentality of the Islamic Republic of Iran, which is indeed an outlaw state whose own conduct has made it a pariah among the community of nations. The Islamic Republic of Iran has expropriated U.S. business assets in violation of the laws of nations, *see, e.g., Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); has overrun U.S. diplomatic property and made hostages of U.S. diplomatic personnel, *id.*; has caused the murder of United States citizens by terrorist cells under its sponsorship, *see Flatow* v. *The Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); and has caused the hostage taking of civilian United States nationals by terrorist cells under its sponsorship, *see Cicippio, et al.* v. *The Islamic Republic of Iran*, ___ F. Supp.2d ___, 1998 WL 547021 (CA No. 96-1805, D.D.C. 27 August 1998).

The "day-to-day control" test employed below was developed for controversies arising out of the FSIA's "commercial activities exception." This test, highly respectful of the corporate form, was intended to establish a

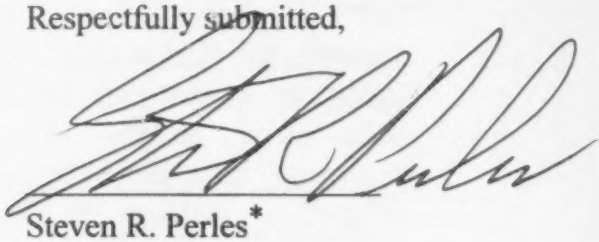
fair allocation of responsibilities among entities whose separate juridical status was presumptively the result of legitimate commercial and governmental purposes. Unlike such cases, actions arising under the "expropriation exception" are aimed at foreign government agencies that are accused of violating international law. The present case, which involves a state that is notorious for its repeated and uninhibited disregard for the law of nations, is exactly the kind of case that demonstrates the importance of respecting the distinction Congress drew between the "expropriation exception" and the "commercial activities exception."

When enacting the "expropriation exception" -- a separate exception to immunity predicated upon foreign state conduct in violation of the laws of nations -- Congress did not intend that courts employ a jurisdictional standard that would facilitate abuses of the corporate form. To do so "would permit governments to avoid international law simply by creating juridical entities whenever the need arises." *Bancec,* 462 U.S. at 633.

Ignoring the clear and emphatic guidance offered by this Court in *Bancec*, the courts below misinterpreted the statute that Congress wrote, creating a safe harbor for international outlaws. In so doing, the courts below have enabled outlaw foreign states that have indisputably expropriated the assets of United States nationals to use the courts of the United States as a shield to "avoid[] the obligations of international law." *Bancec,* 462 U.S. at 634. This is not "consummate hyperbole." On the contrary, this is exactly what is before the Court in this case, as it was in *Bancec* itself.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant his petition for certiorari.

Respectfully submitted,



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